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No.

IN THE

Supreme Court of the United States

DENA BRISCOE, *et al.*,

Petitioners,

v.

JOHN E. POTTER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a procedural due process, *Bivens*-type action is maintainable where it is alleged that the defendant interfered with or otherwise rendered unavailable substantive, statutory or contractual remedies that the plaintiff had a right to pursue.

LIST OF PARTIES

The following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioners:

1. Dena Briscoe
2. Jeffrey Butler
3. Terrell Worrell
4. Vincent D. Gagnon
5. Ossie L. Alston

Respondents:

1. John E. Potter
2. Thomas Day
3. Timothy C. Haney
4. United States Postal Service (USPS) Unknown Officials Nos. 1-10

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OPINIONS BELOW

The decision of the U.S. District Court for the District of Columbia (hereinafter "District Court") is reported at 355 F. Supp. 2d 30 (D.D.C. 2004). *See* Appendix ("App.") B at 5a. The decision of the U.S. Court of Appeals for the District of Columbia (hereinafter "Appellate Court") is reported at 2005 U.S. App. LEXIS 2[illegible]040 (D.C. Cir. Nov. 7, 2005). *See* App. A at 1a.

STATEMENT OF JURISDICTION

The District Court dismissed Petitioners' procedural and substantive due process claims against Respondents brought under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), on November 19, 2004. Petitioners appealed to the Appellate Court, which affirmed the District Court's dismissal on November 7, 2005.

This petition for writ of certiorari is timely, as it is being filed within ninety (90) days of the November 7, 2005 Appellate Court affirmation of the District Court's decision.

If this petition for writ of certiorari is granted, the U.S. Supreme Court will have jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . ..

Occupational Safety and Health Act of 1970, 29 U.S.C. § 654, *et seq.*

Federal Employees Compensation Act, 5 U.S.C. § 8101, *et seq.*

STATEMENT OF THE CASE

I. Procedural History

This *Bivens*-type action arises from the deceitful, shameful and unlawful actions of the officials of the United States Postal Service (hereinafter "USPS"), who intentionally and affirmatively prevented Petitioners (the plaintiffs and appellants, respectively, in the District and Appellate courts) from timely pursuing their rights to secure a safe workplace during the anthrax crisis in Washington, D.C. in October, 2001. Petitioners are USPS employees who worked at the USPS's Washington, D.C. Processing and Distribution Center (hereinafter "the Brentwood facility"), the same facility that processed the anthrax-laden letters sent through the mail to Senators Tom Daschle and Patrick Leahy. The Complaint alleges, *inter alia*, that Respondents (the defendants and appellees, respectively, in the District and Appellate courts) intentionally and affirmatively deprived Petitioners of their

procedural due process rights secured by the Fifth Amendment to the U.S. Constitution and otherwise violated Petitioners' substantive due process rights.

Petitioners' procedural due process claims (Counts 1- 3 of the Complaint) allege that Respondents, knowing the Brentwood facility had become contaminated with highly potent, "weaponized" anthrax, affirmatively interfered with or rendered unavailable the procedures that Petitioners could have, and would have, pursued to prevent their continuing exposure to the deadly anthrax spores at the Brentwood facility. Petitioners alleged that Respondents intentionally and affirmatively prevented them from pursuing their constitutionally protected remedies by: (1) lying to Petitioners that the facility was not contaminated with anthrax; and (2) intentionally threatening, intimidating and coercing Petitioners with disciplinary action, the loss of their jobs, and/or arrest if they asked questions about the Daschle letter, the safety of the facility or their own safety, requested safety instructions regarding the same, or asked to be excused from work. Petitioners allege Respondents' conduct prevented them from timely invoking the protections and remedies afforded by their collective bargaining agreements, the Occupational Safety and Health Act (hereinafter "OSHA") of 1970, 29 U.S.C. § 654, *et seq.*, and USPS emergency response procedures, thereby causing them to continue to be exposed to the danger of injury and death from anthrax contamination at the Brentwood facility.

Respondents filed a motion to dismiss, which Petitioners opposed. The District Court heard argument and by Memorandum Opinion and Order dated November 19, 2004, the District Court granted Respondents' motion to dismiss.

holding that Petitioners' procedural due process claims were preempted by certain statutory and/or contractual remedies that existed. App. B at 21a-31a. Petitioners timely appealed. On November 7, 2005, the Appellate Court affirmed the dismissal of Petitioners' claims for the same reason. App. A at 1a-4a.

II. Statement of Facts

On Tuesday, October 9, 2001, anthrax-laden letters addressed to Senator Daschle and Senator Leahy at their U.S. Senate offices in Washington, D.C. were deposited in the U.S. Mail at Trenton, New Jersey. JA 20.[1] On or about Thursday, October 11, 2001, the Daschle letter entered the Brentwood facility. *Id.* The bag was opened and the contents were processed by Delivery Bar Code Sorter (hereinafter "DBCS") machine #17. *Id.* At approximately 7:10 a.m., the Daschle letter was fed manually into DBCS #17. *Id.* The letter was then moved by mail transport equipment to the Government Mail Section for delivery to the Hart Senate Office Building. *Id.* Between approximately 8:00 a.m. and 9:40 a.m. on Thursday, October 11, 2001, DBCS #17 was opened and a large blower using compressed air was used to blow debris and dust from the conveyor belts and optical reading heads of the machine, spreading deadly anthrax spores from the Daschle letter throughout the Brentwood facility. *Id.*

The Daschle letter was delivered to the Hart Senate Office Building at approximately noon on Friday, October 12, 2001. JA 20. On Monday, October 15, 2001, the Daschle letter was

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[1] "JA" refers to the Joint Appendix submitted to the Appellate Court by the parties.

opened in the Senator's office in the Hart Senate Office Building. *Id.* at 21. The envelope contained a fine white powder. It immediately aroused suspicion, and the Capitol Police were called. *Id.* The Capitol Police immediately arrived and performed a field test on the letter, which was found to contain anthrax spores. *Id.* The ventilation system in the building was immediately shut down, and the building was closed. *Id.* Bundles of letters and packages were quarantined, and all mail delivery was suspended. *Id.* Staffers in Senator Daschle's officer were tested for anthrax contamination and given antibiotics. Even tours of the Capitol were cancelled. *Id.*

Later that same day, the Daschle letter was sent to the U.S. Army Medical Research Institute for Infectious Disease (hereinafter "USAMRIID") at Fort Detrick, Maryland for further testing. JA 22. USAMRIID scientist Dr. John Ezzell tested the letter and concluded that, in his many years of researching anthrax, he had never seen anthrax spores so potent. *Id.* Dr. Ezzell characterized the anthrax in the Daschle letter as being "weaponized." *Id.* Indeed, the anthrax spores were so potent that, when Dr. Ezzell opened the Daschle letter to test it, some of its contents aerosolized instantly. *Id.* Dr. Ezzell immediately began taking antibiotics and took the extreme and painful measure of inhaling a bleach solution to kill any anthrax spores that he may have inhaled. *Id.*

On Tuesday, October 16, 2001, Major General John Parker, U.S. Army Commanding General at USAMRIID, stated with respect to the anthrax spores contained in the Daschle letter: "It's a very potent form of anthrax that was clearly produced by someone who knew what he was doing."

JA 23. On the same day, the FBI notified the USPS Inspection Service that laboratory tests revealed the Daschle letter contained a "potent" strain of anthrax. *Id.* The Inspection Service, in turn, notified Respondent Postmaster General John E. Potter of the potency of the anthrax spores in the Daschle letter. *Id.* Respondent Potter, in turn, notified the other Respondents as Respondent Thomas Day, USPS Vice President of Engineering and an anthrax and security expert, testified at a subsequent community meeting that he and other high level USPS officials were consulted and helped make decisions regarding the Brentwood facility during the anthrax crisis. JA 22. Thus, Respondents knew at least as early as Tuesday, October 16, 2001, that a very dangerous condition likely existed at the Brentwood facility. *Id.*

On Wednesday, October 17, 2001, anthrax spores were found in a mail room at the Dirksen Senate Office Building where the Daschle letter had passed unopened before being delivered to the Hart Senate Office Building. *Id.* at 24. Based on the Dirksen Building mail room findings, Respondents knew or should have known at least as early as Wednesday, October 17, 2001, that the highly potent, "weaponized" anthrax contained in the Daschle letter had likely leaked from the envelope and contaminated the Brentwood facility, creating a serious risk of injury or death to Petitioners. *Id.* at 24, 25.

At least as early as the morning of Thursday, October 18, 2001, Respondent Haney, USPS Senior Vice President Deborah Willhite and other USPS officials knew the Brentwood facility had been contaminated with anthrax. *Id.* at 25, 26. This damaging admission is confirmed in notes

made by Haney on the morning of Thursday, October 18, 2001:

> I met with Rick Edwards, representative of the Senate, Deborah Wilhite (sic), and Terry Poole. Mr. Edwards was upset that the senator [sic] had received an infected letter and wanted to know why it happened and what we were going to do about it . . . When we left the meeting, I pulled Deborah aside and let her know that **the mail was leaking and that we were affected.**

Id. (emphasis added). Respondent Haney informed Respondents Potter and Day that anthrax had leaked out of the envelope containing the Daschle letter processed at the Brentwood facility, causing contamination at the Brentwood facility. *Id.* at 26.

Also on the morning of Thursday, October 18, 2001, Respondent Potter and other Respondents, were notified that the Center for Disease Control (hereinafter "CDC") had confirmed a New Jersey state medical examiner's finding on October 16, 2001 that a letter carrier in New Jersey, where the Daschle letter had been mailed, was suffering from cutaneous anthrax. *Id.* Based on this additional information, Respondents knew or should have known that the "weaponized" anthrax contained in the Daschle letter had likely leaked from the envelope and contaminated the Brentwood facility, creating a serious risk of injury or death to Petitioners, even though the Daschle letter was never opened there.

Indeed, Respondents contacted the Fairfax County HAZMAT Team to have them perform quick, on-site field tests for anthrax at the Brentwood facility. *Id.* at 28. On Thursday, October 18, 2001, the Fairfax County HAZMAT Team sent over two employees in full protective gear, *i.e.*, "moonsuits," to take samples while Petitioners and other postal employees continued their normal duties without any protection. *Id.* The Fairfax County HAZMAT Team tested DBCS machines #16-20 and the Government mail section at the front end of the workroom floor. *Id.* In the afternoon of that same day, inspectors from URS Greiner Woodward Clyde Engineering Consultants (hereinafter "URS"), also wearing protective "moonsuits," began testing the facility for anthrax contamination. *Id.*

Respondent Haney's notes about the results of the URS tests further confirm that, at least as early as Thursday, October 18, 2001, Haney knew the Brentwood facility was contaminated with anthrax:

> URS was in the facility at 2:30 p.m. On my way back from the meeting, I was called by [Postmaster General] Jack Potter and Adam Walsh, (America's Most Wanted), the Deputy Director of the FBI, and Chief Postal Inspector Kenneth Weaver. It was stated that they wanted to do a live broadcast from the Brentwood workroom floor. I contacted Corporate Media and the broadcast was coordinated. They all left after the broadcast (about Noon). I then met with [redacted] from URS along with some members of my staff. We identified the machines that we had reason to feel the mail had been run on. At 6:15 p.m., that night, I spoke with Inspectors Weaver and Clemons to

> get additional information from the letter. They did not have the ID tag information at them time [sic], but we were able to get this information from New Jersey. By decoding the ID tag information, we were able to identify the actual machine the mail had been processed on. Since URS only had 30 swabs available, we did this machine and the manual cases for ZIP Code 20510 (The Senate). **Again, they tested hot.** URS continued with the testing, but it was not completed until 02:30 a.m. on the 19th, at which time I went home.

Id. at 28, 29 (emphasis added).[2] Haney informed Respondents Potter and Day about the results of the URS tests. *Id.* at 26, 29.

Respondent Haney's notes also confirm he knew, at least as early as a 6:00 a.m. meeting with the D.C. Mayor's Office of Emergency Response on Saturday, October 20, 2001, that at least one Brentwood employee was suffering from possible inhalation anthrax exposure and the Brentwood facility was contaminated with anthrax. JA 35. According to Haney's notes:

> Present at the OER meeting were Deborah Willlhite, Inspector Clemons, Susan Medvidovitch, Jerry Lane and myself. **The discussion was about [redacted] who was in the hospital; confirmation that the**

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[2] Because Respondent Haney stated, "Again, they tested hot," it is entirely likely that Respondents had performed prior tests for anthrax contamination at the Brentwood facility and received positive test results before Thursday, October 18, 2001. (Emphasis added).

> **facility tested positive; and that more testing was on the way.** [Emphasis added]. Meanwhile, we were still awaiting the results. I spoke with employees throughout the day. Mr. Sylvester Black arrived at 1:00 p.m. Pat Donahue arrived at 9:30 p.m. We discussed the possibility of relocating operations. I stayed at the facility most of the night.

Id.

Despite having the knowledge that a life threatening condition existed at the Brentwood facility, Respondents failed to invoke any of the USPS emergency response procedures, including the anthrax contamination procedures set forth in Management Instruction EL-860-1999-3, and purposefully failed to evacuate or otherwise shut down the Brentwood facility.[3] *Id.* at 23. Respondents also knowingly failed to alert any of the facility's employees, including Petitioners, in a timely manner that the employees had likely been exposed, and were continuing to be exposed, to anthrax contamination from the processing of the anthrax-laden Daschle letter. *Id.* at 21.

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[3] In October 1999, the USPS issued Management Instruction EL-860-1999-3, entitled "Emergency Response to Mail Allegedly Containing Anthrax," which mandated a safe and healthful work environment for its employees, outlined the hazards of exposure to anthrax and mandated emergency procedures regarding anthrax contamination, including effecting mandatory mechanical shutdowns (including air handling equipment), isolation and evacuation of a contaminated facility. JA 18-20.

Instead, at all relevant times, Respondents Potter and Brentwood Facility Manager Timothy C. Haney repeatedly lied to and falsely assured Brentwood facility employees that the facility was safe when, in fact, they knew it was not safe. *Id.* Respondents Potter and Haney also repeatedly gave intentionally false and/or misleading information to Petitioners and other Brentwood employees, falsely assuring them that they had not been exposed to the deadly bacteria when, in fact, Respondents knew that the facility was contaminated with anthrax from the Daschle letter. *Id.* Worse yet, Respondents repeatedly threatened, coerced, and intimidated Petitioners and other Brentwood employees not to make inquiries about the Daschle letter, the safety of the facility, or their own safety. *Id.*

For instance:

- On Tuesday, October 16, 2001, Postal managers, acting at the direction of Respondents, intentionally instructed Brentwood facility supervisors, via the USPS e-mail system, to provide knowingly false safety briefings to Brentwood facility employees, falsely representing to the employees that there was no evidence any anthrax contaminated letter or mail had come through the facility at any time. JA 24. Petitioner Alston, a Brentwood facility supervisor, received a copy of this false safety briefing with instructions to give the false briefing to employees under his supervision. *Id.* Alston refused to give the false safety briefing, which instead was given by another supervisor. *Id.* The briefing was false, as Respondents well knew, because all mail destined for U.S. Government offices in the District of Columbia,

including mail destined for Senator Daschle's office, was processed only at the Brentwood facility. *Id.*

- On Thursday, October 18, 2001, during a press conference at The White House, Respondent Potter falsely represented that the mail was safe. JA 26. Petitioners Briscoe and Gagnon saw news reports about Potter's press conference on television, and Petitioner Alston heard news reports about Potter's press conference on the radio. *Id.*

- On Thursday, October 18, 2001, Respondent Potter held a press conference in an unused section of the Brentwood facility. JA 26, 27. Employees were discouraged from asking questions at, or even attending, the press conference. *Id.* Some employees were told that they could not attend the press conference while "on the clock." *Id.* Consequently, a large number of employees, including Petitioner Worrell, "clocked out" in order to attend the press conference. *Id.* Other employees, like Petitioner Butler, were told "not to go anywhere near" the press conference. *Id.* During the press conference, Respondent Potter falsely represented to the employees and members of the news media in attendance that the Brentwood facility was safe. *Id.* at 27. Petitioner Briscoe saw news reports about Potter's statements on television, and Petitioner Alston heard news reports about Potter's statements on the radio. *Id.*

- Petitioner Gagnon was one of the many employees who "clocked out" on his lunch break in order to attend Respondent Potter's press conference. JA 27. During a "question and answer" period, Gagnon raised his hand to

try to ask a question. *Id.* As soon as Gagnon raised his hand, however, someone grabbed his arm from behind and forced it down. *Id.* Gagnon looked back, and the man who grabbed his arm said that "you can't ask any questions" and flashed his Postal Inspector's Badge. *Id.* Gagnon responded that he was not doing anything illegal and pulled his arm away from the Postal Inspector's grasp. *Id.* The Postal Inspector then threatened Gagnon that, if he tried to ask any questions again, he would be arrested. *Id.* Gagnon then left the press conference and returned to work. *Id.* Upon his return to work, Gagnon's supervisor was waiting for him. *Id.* at 27, 28. The supervisor informed Gagnon that she had been instructed by Respondent Haney to initiate proceedings to fire him for going to the press conference and trying to ask questions. *Id.* News of Gagnon's attempt to ask a question at Respondent Potter's press conference and subsequent exchange with the Postal Inspector, as well as his threatened firing, was widely discussed among many employees at the Brentwood facility. *Id.* at 28. The incident caused many Brentwood facility employees to feel intimidated and made them fearful of asking questions of their supervisors about the safety of the facility. *Id.*

- On October 18, 2001, Respondent Haney, acting at the direction of Respondents Potter and/or Day, falsely represented to Brentwood Postal employees at a series of "floor" meetings that both the building and the mail were safe and that the employees should continue to work. JA 29. Haney falsely told the employees that there was no anthrax in the building and nobody was going to die from it, even though, as his own notes show, he knew URS had

found anthrax contamination at the Brentwood facility. *Id.* Haney also told the employees that the CDC would be conducting tests throughout the building in "moonsuits," but they should not be alarmed because the facility was safe. *Id.* Brentwood facility employee Joseph Curseen, Jr., who later died of inhalation anthrax, was in attendance at one of these meetings. *Id.*

- During one of these "floor" meetings on Thursday, October 18, 2001, Petitioner Worrell asked Respondent Haney about the possible dangers of the ever-present clouds of dust that were kicked up into the air by the mechanized equipment, pressurized air hoses that cleaned the equipment, power oxen, forklift trucks, and other power equipment. *Id.* at 29, 30. Haney would not answer Worrell's question. *Id.* Haney falsely represented to Worrell and the other employees in attendance that, as soon as he had any anthrax test results, he would inform the employees, but that the building and the mail were safe. *Id.* He also stated that the USPS could not afford to have employees sitting at home on administrative leave while tests were being performed. *Id.* Haney further told the Brentwood Postal employees that it would cost the USPS $500,000 a day if the Brentwood facility were shut down. *Id.* Haney even threatened the employees that, if they did not report for work, they would lose their jobs. *Id.*

- During another "floor" meeting on Thursday, October 18, 2001, Brentwood facility employee Kelvin Sanker asked Haney why the machines and building were being tested by biological hazard experts in "moonsuits," but employees were not being tested or evacuated. *Id.* at 30,

31. Haney refused to answer Sanker's question and threatened to expel Sanker from the building. *Id.*

• One supervisor told letter carrier Vernon Porter, who reported to the Government mail and Express mail sections of the Brentwood facility everyday he worked, including each day between the discovery of the Daschle letter on Monday, October 15, 2001 and Friday, October 19, 2001, that there was "nothing to worry about" and that all employees should come to work and do their jobs. JA 31. When Porter asked other supervisors about persons wearing "moonsuits" in the facility, he was told to mind his own business and get back to work. *Id.*

• On October 19, 2001, Respondent Potter falsely represented on a USPS - TV news program entitled "Keeping Our Focus" and in an accompanying notice posted on all employee bulletin boards at the Brentwood facility that early reports of testing at the Brentwood facility showed no anthrax contamination when, in fact, he knew anthrax contamination at the Brentwood facility had been confirmed. JA 33. "We are talking with employees and sharing information as quickly as it becomes available," Potter also falsely claimed. *Id.*

• On October 19, 2001, Respondent Haney, acting at the direction of Respondents Potter and/or Day, held another series of "floor" meetings with Brentwood employees, including Petitioners Butler and Worrell, at which Haney again falsely represented that the Brentwood facility was safe and that he was doing everything he could to keep the employees safe. App. B at 26a, 33a.

- On Saturday, October 20, 2001, Respondent Haney, acting at the direction of Respondents Potter and/or Day, held another series of "floor" meetings with Brentwood facility employees, including Petitioners Briscoe, Butler, and Worrell, at which Haney again falsely represented that the facility was safe and no evidence of anthrax spores had been found. JA 26, 36. Haney falsely stated: "We have made it this far and we do not have any positive test results for anthrax." *Id.* He mentioned that one Brentwood facility employee had been hospitalized and was being examined for possible inhalation anthrax. *Id.* Haney falsely stated, however, that the employee's tests had been negative so far and that everything was okay. *Id.* He then expressed concern that the mail volume being processed in the facility was dropping, as were processing goals. *Id.* Haney told the employees that they needed to focus on processing the mail and meeting their processing goals. *Id.* He also falsely promised that all news would be shared with the employees. *Id.*

- On Monday, October 22, 2001, Brentwood facility Supervisor of Maintenance Operations Tihoe arrived at the Brentwood facility parking lot and, while walking through the gate to the Brentwood facility, spoke with Mail Processing Manager Greg Hall. JA 39, 40. Hall told Tihoe that senior Brentwood managers, acting at the direction of Respondents Potter, Day, Haney, and Unknown Officials Nos. 1-10, had told him and other mid-level managers to falsely represent to the floor supervisors and employees that the Brentwood facility was not contaminated with anthrax. *Id.*

Had Respondents Potter and Haney not coerced, intimidated, and threatened Petitioners and made false and/or misleading statements to Petitioners that the Brentwood facility was safe and that there was no evidence of anthrax contamination at the facility, among other false and/or misleading statements, Petitioners would have timely invoked the remedies available to them to require a safe working environment under their collective bargaining agreements and the OSHA, as well as USPS emergency response procedures.[4] *Id.* at 40. At all relevant times, Petitioners relied on the knowingly false and/or misleading statements made by Respondents Potter and Haney. *Id.* At no time relevant to the acts and omissions alleged herein did Petitioners understand these statements to be false. *Id.*

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[4] Each Petitioner brings this action in his or her individual capacity and also as a representative of the Brentwood employees represented by the union of which the individual Petitioner is a member. JA 10-12. At all relevant times to this action, the USPS had collective bargaining agreements in effect with each of these unions, except National Association of Postal Supervisors, that covered all their respective members and provided, *inter alia*, that: (1) USPS management was required to provide safe working conditions in all USPS facilities and to develop a safe work force; (2) USPS management was required to follow safety procedures and correct unsafe conditions; and (3) specific remedies, in the form of grievance and arbitration procedures, were available for union members who believed they were being required to work under unsafe conditions. *Id.* 15-17. In addition, at all relevant times, Petitioners were entitled to the full protections and remedies of the OSHA, among other applicable laws and regulations, including the right to a safe working environment, the right to decline to perform work for health and safety-related reasons, the right to request health and safety inspections, and the right to file complaints about unhealthy and unsafe working conditions. *Id.*

At 4:39 a.m. on Sunday, October 21, 2001, Brentwood employee Thomas Morris, Jr. called 911 complaining of symptoms of inhalation anthrax. JA 37. Morris died of inhalation anthrax several hours later. *Id.*

At approximately 11:00 a.m. on Sunday, October 21, 2001, CDC Representative Jim Haslet told Respondent Haney that the Brentwood facility must be closed. *Id.* After his conversation with Haslet, Haney told all employees to gather in the cafeteria at 12:00 p.m. for a meeting. *Id.* At the meeting, Haney told the employees in attendance, including Petitioner Worrell, that a postal worker was in the hospital with a confirmed diagnosis of anthrax and that the facility was being closed as a "precautionary measure." *Id.* The employees in attendance were directed to go to Judiciary Square for medical evaluation and treatment. *Id.*

Not all employees were allowed to attend the meeting in the cafeteria. *Id.* at 37, 38. Approximately eight to ten employees, including Petitioner Butler, were paged on the public address system and instructed to report to the Manager of Distributions Operations (hereinafter "MDO") office. *Id.* When Butler reported to the MDO office, he was told to take a seat in the conference room, which he did. *Id.* After the other employees arrived, Supervisory Manager of Distribution Operations (hereinafter "SMDO") Talley entered the conference room and addressed the group of employees. *Id.* Acting at the direction of Respondent Haney, SMDO Talley stated that she needed her "best workers" to help her round up all of the mail at the Brentwood facility and move it to the loading dock/platform area so that it could be loaded onto trucks. *Id.* The employees asked SMDO Talley what was going on in the cafeteria with the other employees. *Id.*

SMDO Talley responded by stating that she did not know for sure, but that she thought the facility was going to be closed as a "precautionary measure." *Id.* She repeated that she, personally, did not have any firm information that the building was contaminated, but that she needed the help of her "best workers" to help get every piece of mail in the building ready to be moved out as soon as possible. *Id.* Based on Respondents' previous false assurances that the facility was not contaminated with anthrax, the employees, including Butler, did as SMDO Talley directed. *Id.* at 38. At no point during the meeting were any of the employees notified that the facility had been contaminated with anthrax. *Id.*

Petitioner Butler continued to work until 5:00 p.m., gathering mail throughout the building and organizing it into flat trays, hampers, and other equipment, and moving it to a platform so that it could be loaded on trucks for shipment. *Id.* Respondents never provided Butler with any protective gear. *Id.* After finishing his work, Butler went to his car in the parking lot. *Id.* As Butler drove towards the exit of the parking lot, he saw a manager handing out flyers to the next tour of employees arriving for their shift. *Id.* Butler pulled over his car and asked the manager for a flyer. *Id.* It was only upon reading the flyer that Butler learned that the Brentwood facility was being closed due to anthrax contamination and that all postal employees were being instructed to report to Judiciary Square for medical evaluation and treatment. *Id.*

At approximately 7:00 p.m. on Sunday, October 21, 2001, the Brentwood facility was finally closed, ten days after the Daschle letter had passed through the facility, and at least four days after Respondents knew the facility had been

contaminated. *Id.* at 39. At the time of the filing of this lawsuit, the Brentwood facility remained closed due to anthrax contamination. *Id.* at 41.

On the morning of Monday, October 22, 2001, Brentwood facility employee Joseph Curseen went to the hospital with flu-like symptoms. *Id.* at 40. That evening, Curseen died of inhalation anthrax. *Id.* That same day, two more Brentwood facility employees were hospitalized and nine other employees became ill with symptoms of inhalation anthrax. *Id.* Since the anthrax contamination at the Brentwood facility in October 2001, many Brentwood employees, including Petitioners Briscoe, Butler, Worrell, Gagnon, and Alston, have experienced and continue to experience similar symptoms, in addition to substantial emotional distress, pain, suffering, and anxiety caused by these events. *Id.*

REASONS FOR GRANTING THE WRIT

A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE THIS IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court has not ruled on the important question of federal law raised by Petitioners' lawsuit, namely, whether a procedural due process, *Bivens*-type action is maintainable where it is alleged that the defendant interfered with or otherwise rendered unavailable substantive, statutory or contractual remedies that the plaintiff had a right to pursue

In *Bush v. Lucas*, 462 U.S. 367 (1983), this Court declined to allow a substantive due process, *Bivens*-type remedy for the

denial of a statutory right. In *Bush*, the petitioner made statements to the press regarding his government employer. As a result of the statements the petitioner was demoted. In addition to his administrative appeal, the petitioner brought a *Bivens*-type claim against his employer in a court of law, alleging that the retaliatory demotion violated his First Amendment rights. The district court and the United States Court of Appeals for the Fifth Circuit held that the Civil Service Commission regulations barred the petitioner's claim because he had remedies available to him under that statutory scheme.

The U.S. Supreme Court affirmed this holding. The Court looked to the Civil Service Commission regulations and noted that "[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures–administrative and judicial–by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies." *Bush*, 462 U.S. at 385. The Court then found that the petitioner's First Amendment claim was "fully cognizable within the system." *Id.* at 386. As a result, the Court held, "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Id.* at 368.

In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), this Court again declined to allow a substantive due process, *Bivens*-type remedy for the denial of a statutory right. In *Schweiker*, the

plaintiffs' social security disability benefits were improperly terminated. Although the plaintiffs' disability benefits were eventually restored, the plaintiffs brought a substantive due process *Bivens*-type action against three policymakers who the plaintiffs alleged were responsible for the illegal policies that resulted in their benefits being terminated in the first place. The U.S. Supreme Court found that Congress had already enacted elaborate administrative and judicial remedies, including review of constitutional claims, for those who claimed that they were wrongfully denied social security disability benefits. *Id.* at 424-26. As a result, the High Court refused to create a new damages remedy. *Id.* at 429.

In neither *Bush* nor *Schweiker*, however, did the Court answer the question of whether a procedural due process *Bivens*-type action is maintainable where a plaintiff has alleged that the defendant interfered with or otherwise rendered unavailable the substantive, statutory or contractual remedies that the plaintiff had a right to pursue. Such is the question presented in the instant case.[5]

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[5] Petitioners' procedural due process *Bivens*-type claims are premised on Respondents' rendering effectively unavailable the remedies that Petitioners were entitled to pursue and would have pursued absent Respondents' actionable conduct. Specifically, had Respondents not coerced, intimidated, and threatened Petitioners not to make inquiries about the Daschle letter, the safety of the facility, or their own safety and had Respondents not made false and/or misleading statements to Petitioners that the Brentwood facility was safe and that there was no evidence of anthrax contamination at the facility, among other false and/or misleading statements, Petitioners would have timely invoked, during the critical four days that Respondents knew the Brentwood facility was contaminated with anthrax and needlessly kept the facility open, the remedies available to them to require a safe working environment under their collective bargaining agreements and the OSHA, as well as USPS

Although the U.S. Supreme Court has not addressed the precise question presented in the instant case, several U.S. district and appellate courts have addressed the question and answered in the affirmative. For instance, in *Grichenko v. USPS*, 524 F.Supp. 672, 676-78 (E.D.N.Y. 1981), *aff'd without opinion*, 751 F.2d 368 (2nd Cir. 1984), a USPS employee brought a procedural due process, *Bivens*-type action against several USPS officials. The plaintiff alleged that the defendants violated his right to due process by failing to timely process his injury claim under the Federal Employees Compensation Act (hereinafter "FECA"), 5 U.S.C. § 8101, *et seq.* The defendants moved to dismiss the plaintiff's *Bivens* claim, arguing that the claim was preempted by FECA.

The U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling that the plaintiff's procedural due process claim was not preempted by FECA because his procedural due process claim was separate from his substantive injury claim and was not dependent upon the outcome of the Department of Labor's decision on his substantive claim.[6] In so holding, the court noted: "It is the defendants' interferences, not the Department of Labor decision which lies at the heart of this claim." *Id.* at 677. Thus, whether Grichenko could have prevailed on his substantive claim, had it been timely processed, was irrelevant

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emergency response procedures

[6] Further confirming that a plaintiff's procedural due process claim is independent of his substantive injury claim, the court stated that "a plaintiff should not encounter much difficulty in demonstrating that an injury, including mental distress, resulted not from the substantive loss, but from the deprivation of procedural due process itself." *Id.* at 678.

to his right to maintain his procedural due process cause of action. *Id.*

Importantly, the court recognized that FECA "[gave] Grichenko a legitimate expectation that where he believes he has sustained a compensable injury, his claim will be properly and timely processed under the Act." *Id.* at 677. The court also found that a FECA claim did "not provide an available, let alone substitute, remedy for the constitutional violation asserted," *i.e.*, the interference with the plaintiff's remedies. *Id.* Thus, the court did "not find any special factors 'counseling hesitation' or suggesting the inappropriateness of a Bivens type action." *Id.* at 677 (quoting *Carlson v. Green*, 446 U.S. 14, 19 (1980)). The court also found that a *Bivens*-type remedy was particularly effective for a procedural due process claim because it would serve not only to compensate the plaintiff but also to deter similar conduct by the defendants in the future. *Id.* at 677 (quoting *Carlson*, 446 U.S. at 21 ("Bivens remedy, in addition to compensating victims, serves a deterrent purpose.")).

Similarly, in *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980), a federal employee plaintiff brought a procedural due process, *Bivens*-type action against several government officials. The plaintiff alleged that the defendants had blocked his resort to certain civil service remedies that he was entitled to pursue when the defendants failed to provide him with accurate information and made continuing threats that coerced him into not pursuing his administrative remedies. The court found that the plaintiff's procedural due process claim was not preempted by the comprehensive civil service remedies enacted by Congress because the defendants' interference with the plaintiff's administrative remedies rendered those

remedies "of little avail" to the plaintiff. *Id.* at 357. The Court stated further that, if the plaintiff could "prove defendants interfered with his right to procedural due process, he is entitled to the damages that actually resulted, which would include, for example, mental and emotional distress." *Id.*

In *Rauccio v. Frank*, 750 F. Supp. 566 (D. Conn. 1990), a case strikingly similar to the instant case, a USPS employee brought a procedural due process *Bivens*-type action against several USPS officials. The plaintiff alleged that the defendants had blocked his resort to certain civil service remedies that he was entitled to pursue by failing to provide him with relevant information and by their continuing threats, coercion, intimidation and deceit. The defendants moved to dismiss the plaintiff's *Bivens*-type claim, arguing that the claim was preempted by the Civil Service Reform Act (hereinafter "CSRA") of 1978, 5 U.S.C. § 2301, *et seq.*

Similar to the holdings in *Grichenko* and *Bishop*, the court in *Rauccio* held that the plaintiff's procedural due process claim was not preempted by the CSRA. The court emphasized that a *Bivens*-type remedy was proper where it is alleged that the defendants had interfered with, foreclosed and/or rendered effectively unavailable the plaintiff's resort to the remedies that he was entitled to pursue. In so holding, the court correctly distinguished *Bush*, 462 U.S. 367, and *Schweiker*, 487 U.S. 412, stating in pertinent part:

> However, as plaintiff points out, *Bush v. Lucas* and its progeny are premised on the existence and availability of an adequate system of procedural safeguards through which a plaintiff may seek relief. In the

> instant case, the plaintiff's due process claim is premised on the defendants' interference with the procedural mechanism which Congress has created for the protection of employees. It is in this critical respect that *Bush v. Lucas* and the related cases cited by defendants are distinguishable. In each, the availability of an adequate procedural remedy was fatal to plaintiff's *Bivens* claims. In this case, assuming plaintiff's factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress. Thus, *Bush* and its progeny are inapplicable to the facts of this case.

Id. As a result, the court properly rejected the defendants' preemption argument and refused to dismiss the plaintiff's *Bivens*-type claim.

CONCLUSION

The Court should take this opportunity to declare that a procedural due process, *Bivens*-type remedy is maintainable where it is alleged that the defendant interfered with or otherwise rendered unavailable the substantive statutory or contractual remedies that the plaintiff had a right to pursue. Petitioners respectfully request that a writ of certiorari be issued to resolve this important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A - NOVEMBER 7, 2005
APPELLATE COURT OPINION

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENA BRISCOE, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 04-5447
	)	
JOHN E. POTTER, United States Postmaster General, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	

On Appeal from the United States District Court for the District of Columbia. Rosemary M. Collyer, United States District Judge. (No. 03cv02084).

2005 U.S. App. LEXIS 24040

October 27, 2005, Argued
November 7, 2005, Decided

DISPOSITION:

Affirmed.

COUNSEL:

ARGUED: Dale L. Wilcox, JUDICIAL WATCH, INC., Washington, D.C., for Appellants.

Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Paul J. Orfanedes, Dale L. Wilcox, JUDICIAL WATCH, INC., Washington, D.C., for Appellants.

Eileen J. O'Connor, Assistant Attorney General, Thomas M. DiBiagio, United States Attorney, Jonathan S. Cohen, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

JUDGES: Before SENTELLE, TATEL, and GARLAND, Circuit Judges.

OPINION BY: No Opinion Given

JUDGMENT:

This appeal was considered on the record from the United States District Court for the District of Columbia, and on the briefs of the parties and oral arguments by counsel. The court has determined that the issues presented occasion no need for an opinion. *See D.C. Cir. Rule 36(b).*

Plaintiffs claim various officials at the United States Postal Service (USPS) violated their rights under both the procedural and "substantive" components of the *Fifth Amendment's Due Process Clause*. Specifically, the complaint alleges that the defendants intentionally misrepresented the safety of USPS's Brentwood Processing and Distribution Center in Washington, D.C., where the plaintiffs were working when they were exposed to anthrax in October 2001. Relying on *Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, the plaintiffs claim the USPS officials should be personally liable for money damages. The District Court dismissed the complaint.

We conclude the plaintiffs' *Bivens* claims are precluded by an "elaborate, comprehensive scheme" that Congress has provided to govern employees' injuries in federal workplaces. *Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); see also Schweiker v. Chilicky, 487 U.S. 412, 424-25, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*. Under the Federal Employees Compensation Act (FECA), the government must "pay compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." *5 U.S.C. § 8102(a)*. FECA provides the exclusive remedy for Richmond's injuries. *See Johansen v. United States, 343 U.S. 427, 439-40, 72 S. Ct. 849, 96 L. Ed. 1051 (1952)* (FECA is the "exclusive right to Government employees for compensation, *in any form*, from the United States. . . . [FECA's] comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive.") (emphasis added). It is therefore

ORDERED AND ADJUDGED that the District Court's dismissal of the complaint is affirmed.

Pursuant to *Rule 36* of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See FED. R. APP. P. 41(b); D.C. CIR. R. 41.*

Per Curiam

APPENDIX B - NOVEMBER 19, 2004 DISTRICT COURT MEMORANDUM OPINION AND ORDER

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DENA BRISCOE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03cv02084
	)	
	)	
JOHN E. POTTER, United States Postmaster General, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

355 F. Supp. 2d 30; 2004 U.S. Dist. LEXIS 25101

November 19, 2004, Decided
November 19, 2004, Filed

COUNSEL:

For DENA BRISCOE, JEFFREY BUTLER, TERRELL WORRELL, VINCENT D. GAGNON, VERNON PORTER, NOSSIE L. ALSTON, plaintiffs: Paul J. Orfanedes, Dale L. Wilcox, JUDICIAL WATCH, INC., Washington, D.C.

For JOHN E. POTTER, THOMAS DAY, TIMOTHY C. HANEY, defendants: Glenn Stewart Greene, R. Joseph Sher, United States Department of Justice, Washington, D.C..

JUDGES: Rosemary M. Collyer, United States District Judge.
OPINION BY: Rosemary M. Collyer

OPINION:

MEMORANDUM OPINION

The entire country remembers the anxiety that ensued following public revelation that a letter containing anthrax had been delivered to Senator Tom Daschle's office on October 15, 2001. What was not immediately appreciated was that the letter to Senator Daschle exposed some postal workers to its deadly contents when it was processed through the United States Postal Service Brentwood Processing and Distribution Center ("Brentwood") in Washington, D.C. Other Brentwood employees now sue several high-ranking officials of the United States Postal Service ("USPS") in their individual capacities n1 -- John E. Potter, Postmaster General; Thomas Day, Vice President of Engineering; and Timothy C. Haney, Senior Plant Manger -- for allegedly providing false and/or misleading information, and failing to provide accurate information, about the safety of the facility after they allegedly knew it was contaminated with anthrax.

n1 Plaintiffs also sue USPS Unknown Officials Nos. 1-10.

Plaintiffs assert that USPS officials deprived them and other Brentwood workers of their rights to procedural and substantive due process under the *Fifth Amendment to the United States Constitution*, giving rise to personal liability. n2 Taken together, the first three counts of the complaint allege that Defendants' conduct prevented Plaintiffs from invoking protections and remedies under their collective bargaining agreements, the Occupational Safety and Health Act of 1970, *29 U.S.C. § 654 et seq.*, and USPS emergency procedures. The fourth count alleges that Defendants infringed on Plaintiffs' "substantive due process liberty interest in a safe working environment free from needless danger[.]" Compl. P 127. Defendants move to dismiss the complaint, arguing that the Federal Employees' Compensation Act ("FECA"), *5 U.S.C. § 8101 et seq.*, is the exclusive remedy available to federal employees injured in the workplace and that each defendant is protected by qualified immunity from suit. Plaintiffs oppose this motion.

n2 Each plaintiff brings this action in his or her individual capacity and also claims to be a representative of the Brentwood employees represented by the union of which the individual plaintiff is a member. Plaintiffs Dena Briscoe and Jeffrey Butler are members of the American Postal Workers Union (APWU); Plaintiffs Terrell Worrell and Vincent D. Gagnon are members of the National Postal Mail Handlers Union (NPMHU); Plaintiff Vernon Porter, now deceased, was a member of the National Association of Letter Carriers (NALC); and Plaintiff Ossie L. Alston is a member of the National

Association of Postal Supervisors (NAPS). USPS has collective bargaining agreements covering the affected employees with each of these unions except NAPS. Mr. Alston has not claimed that he was deprived of any right under a collective bargaining agreement.

I. BACKGROUND n3

n3 For purposes of a motion to dismiss, the facts are taken from the allegations of the complaint and are presumed to be true. *See* infra Part III. In fairness, it should be noted that Defendants "flatly deny that they knew that the Brentwood facility was contaminated by anthrax or knew that Brentwood workers were at risk for anthrax." Defs.' Mot. to Dismiss at 5 n.2 ("Defs.' Mot.").

On Tuesday, October 9, 2001, an unknown person(s) mailed from Trenton, New Jersey, an anthrax-laden letter addressed to United States Senator Tom Daschle at his office in Washington, D.C. n4 That letter arrived in a mail bag at Brentwood on or about Thursday, October 11, 2001. The mail bag was opened and its contents were separated into the Delivery Bar Code Sorter ("DBCS") machine # 17; the Daschle letter was fed manually into DBCS # 17 at approximately 7:10 a.m. The letter was then moved to the Government Mail section for delivery to the Hart Senate Office Building, where Senator Daschle's office is located. Between approximately 8:00 a.m. and 9:40 a.m., DBCS # 17 was opened in the normal course of operations and a large blower using compressed air was used to blow debris

and dust from the conveyor belts and optical reading heads of the machine.

n4 An anthrax-laden letter was also mailed to Senator Patrick Leahy.

The Daschle letter was delivered to the Hart Senate Office Building at approximately noon on Friday, October 12, 2001. It was opened in the Senator's personal office the following Monday, October 15, 2001. The envelope contained a fine white powder, which aroused suspicion. The Capitol Police were called and they performed a field test on the letter, which was ultimately found to contain anthrax spores. Subsequently, the ventilation system in the Hart Senate Office Building was shut down and the building was closed; bundles of letters and packages were quarantined and all mail delivery was suspended; staffers in Senator Daschle's office were tested and given antibiotics; and tours of the Capitol were canceled.

In contrast, the Brentwood facility continued to operate as usual. During a regularly -- scheduled "floor" meeting on Monday, October 15, 2001, Larry Littlejohn, a Brentwood maintenance technician, asked his supervisor for a briefing on anthrax and proper safety procedures. The supervisor refused to provide the requested briefing, threatened Mr. Littlejohn with a seven-day suspension, and had him forcibly expelled from the building. Mr. Littlejohn was later suspended for seven days for reasons that are not in the record.

Other events also occurred on Monday, October 15, 2001. In Denver, Colorado, Postmaster General Potter

delivered a speech during which he declared that the USPS mail system was safe and USPS Vice President of Engineering Day began coordinating the USPS response to the Daschle letter. In addition, the Daschle letter was sent to the United States Army Medical Research Institute for Infectious Disease ("Institute") for further testing, where Dr. John Ezzell tested it. Dr. Ezzell characterized the anthrax in the letter as "weaponized" because it was so potent. Compl. P 48.

On Tuesday, October 16, 2001, all Senate employees were tested for anthrax exposure and given antibiotics as a countermeasure. The tests apparently "showed that at least twenty (20) Senate staffers had been exposed to anthrax, including staffers on a floor below Senator Daschle's office and at least one staffer who had not been at work when the letter was opened the previous day." *Id.* P 49. On that same day, Major General John Parker, United States Army Commanding General of the Institute, stated that the anthrax spores in the Daschle letter constituted "a very potent form of anthrax that was clearly produced by someone who knew what he was doing." *Id.* P 50 (internal quotation marks omitted). The Federal Bureau of Investigation ("FBI") reported to the USPS Inspection Service which, in turn, notified Mr. Potter that the letter had contained a "potent" strain of anthrax. *Id.* P 51. Despite these developments, USPS officials allegedly instructed Brentwood supervisors "to provide false safety briefings . . . representing to the employees that there was no evidence any anthrax contaminated letter or mail had come through the facility at any time, including the letter that was sent to Senator Daschle's office." *Id.* P 53. Plaintiff Ossie Alston, a supervisor at Brentwood, asserts that he refused to deliver this message and a fellow supervisor gave the briefing.

On Wednesday, October 17, 2001, the United States House of Representatives was shut down after it appeared that thirty-one (31) staff members had tested positive for exposure to anthrax. n5 Anthrax spores were found in a mail room at the Dirksen Senate Office Building, through which the letter to Senator Daschle had passed before being sent on to the Hart Senate Office Building. USPS ordered that the Brentwood facility be tested for anthrax spores on that day, as well, although no one advised employees of any possible danger.

n5 Plaintiffs report that the number was later reduced to twenty-eight staffers.

On Thursday, October 18, 2001, all buildings on Capitol Hill were closed and quarantined. USPS officials, including Brentwood Plant Manager Timothy Haney and USPS Senior Vice President Deborah Willhite, met that morning with Senate representatives. According to notes kept by Mr. Haney, he privately advised Ms. Willhite that "the mail was leaking and that we were affected." *Id.* P 60. During that same morning, USPS was notified that the Centers for Disease Control ("CDC") had confirmed that a letter carrier in New Jersey, where the Daschle letter had been mailed, was suffering from cutaneous anthrax. However, during a morning press conference at the White House, Postmaster General Potter assured the public that the mail was safe.

In the early afternoon, the Postmaster General held a second press conference in an unused section of Brentwood, where he again told the news media and

employees in attendance that Brentwood was safe. When Plaintiff Vincent Gagnon attempted to ask a question at the press conference, a Postal Inspector prevented him from doing so. Mr. Gagnon -- who had clocked out to attend the press conference -- then returned to work, where his supervisor informed him that "she had been directed [by Plant Manager Haney] to initiate proceedings to fire him for going to the press conference and trying to ask questions." *Id.* P 67.

Plant Manager Haney held a series of "floor" meetings with Brentwood employees on Thursday, October 18, 2001, to inform them that there was no anthrax in the building. He also mentioned that the CDC would be conducting tests in protective gear (*i.e.*, "moonsuits"). At one meeting, plaintiff Terrell Worrell asked about the possible dangers of dust in the air. Mr. Haney allegedly responded, "What do you want us to do? Put bars on the windows, shut off the fans and close the doors? If we do those things, we are giving in to terrorism." *Id.* P 74. Mr. Haney apparently told employees that they would lose their jobs if they did not report for work, noting that "it would cost the USPS $ 500,000 a day if the Brentwood facility were shut down." *Id.* At another "floor" meeting, Mr. Haney allegedly refused to answer questions about why the machines and the building were being tested but employees were not.

Also on Thursday, October 18, 2002, USPS contacted the Fairfax County (Virginia) HAZMAT Team to have an on-site field test for anthrax spores conducted at Brentwood. Two HAZMAT Team members and inspectors from a private consulting firm came to Brentwood in moonsuits that afternoon, to begin testing for contamination while postal employees continued their normal duties. At

least by sometime that evening, the test results apparently showed that some of the Brentwood equipment " again . . . tested hot.'" n6 *Id.* P 71. Testing continued until 2:30 a.m. on October 19, 2001.

> n6 USPS informed the Court at oral argument that the Fairfax HAZMAT field tests showed no anthrax contamination. While this fact is missing from the complaint, it was not contested by the plaintiffs. In any event, it does not affect the legal analysis.

Notes from Plant Manager Haney indicate that, by 11 a.m. on Friday, October 19, 2001, USPS officials had determined that the DSBC # 17 had been used to sort the mail that included the letter to Senator Daschle. The CDC arrived at Brentwood that afternoon and began its analysis. In the meantime, USPS officials asked the District of Columbia Department of Health to place all Brentwood employees on antibiotics for exposure to anthrax. On that same day, Mr. Potter told a television interviewer that early reports of testing showed no anthrax contamination at Brentwood; this same information was posted on all employee bulletin boards at the Brentwood facility. Similarly, Mr. Haney held another series of "floor" meetings to assure employees that Brentwood was safe and that he was doing everything in his power to protect them.

Despite Messrs. Potter's and Haney's representations, rumors began to circulate throughout Brentwood on Friday afternoon that DBCS # 17 was contaminated with anthrax spores. Several technicians assigned to work on DBCS # 17 asked plaintiff Ossie Alston if this were true. Mr. Alston

told the employees to stay away from DBCS # 17 until he could determine the facts. Two supervisors then informed Mr. Alston that they had not been told that DBCS # 17 or any other machine was contaminated. At approximately 4:15 p.m., however, a third supervisor told Mr. Alston that DBCS # 17 was not to be used because it was contaminated. This third supervisor allegedly advised Mr. Alston that gloves and masks were available for employee use, but that he should not pass them out to employees unless they specifically asked for them. At some point on Friday, October 19, 2001, DBCS # 17 was taken off-line.

At approximately 11:30 p.m. on Friday, October 19, 2001, a Brentwood manager "insisted that [DCBS # 17] was not contaminated and ordered [technicians] to clean DCBS # 17 by blowing it out' with compressed air and to get it on-line immediately." *Id.* P 89. Brentwood employees reportedly heard managers state that they needed DBCS # 17 on-line because another DBCS machine had broken down. As a result, DBCS # 17 was re-activated.

Also on Friday, October 19, 2001, Brentwood employee Leroy Richmond entered the emergency room at Fairfax Inova Hospital with symptoms of inhalation anthrax. Doctors determined from blood tests that Mr. Richmond was suffering from inhalation anthrax. Mr. Richmond's wife called Plant Manager Haney and left a voicemail message describing her husband's condition and telling Mr. Haney to shut down Brentwood.

During an early-morning meeting with the Mayor's Office of Emergency Response on Saturday, October 20, 2001, it is alleged that USPS officials -- including Mr. Haney -- discussed Mr. Richmond's illness, and "confirmation that the facility tested positive; and that more

testing was on the way.'" *Id.* P 93. Nonetheless, Mr. Haney conducted "floor" meetings at Brentwood throughout the day on Saturday and allegedly told employees, " We have made it this far and we do not have any positive test results for anthrax.'" *Id.* P 94. He promised that all news would be shared with employees and urged them to concentrate on processing the mail and meeting processing goals. Tests in the Ford Office Building on Saturday turned up anthrax where mail was processed for the U.S. House of Representatives and where it was delivered from Brentwood.

At 4:39 a.m. on Sunday, October 21, 2001, Brentwood employee Thomas Morris, Jr., called 911 complaining of anthrax-like symptoms. Mr. Morris died of inhalation anthrax several hours later.

At approximately 11:00 a.m. on Sunday, a CDC representative told Plant Manager Haney that Brentwood needed to be closed. Mr. Haney then ordered all employees to gather at noon in the cafeteria, where he told them that a postal worker was in the hospital with a confirmed case of anthrax exposure and that Brentwood was being closed as a " precautionary measure.'" *Id.* P 99. The employees in attendance were directed to go to Judiciary Square, a District of Columbia Government facility, for medical evaluation and treatment.

Not all Brentwood employees were allowed to attend the meeting in the cafeteria; a group of eight to ten workers was directed to report to a manager's office. They were told that they were needed to "round up all of the mail at Brentwood and move it to the loading dock/platform so that it could be loaded onto trucks" and removed from the building. *Id.* P 31. The manager said that she thought

Brentwood would be closed as a "precautionary measure." Plaintiff Jeffrey Butler was among this small group of employees. He worked until 5:00 p.m. and then, upon driving out of the parking lot, received a flyer that was being distributed to incoming workers. Only upon receiving the flyer did Mr. Butler learn that Brentwood was closed and the postal workers were being directed to Judiciary Square for medical evaluation and treatment. Plaintiff Vincent Gagnon continued to work inside Brentwood until approximately 7:00 p.m. to turn off fans and air and dust-handling equipment. Brentwood was finally closed at approximately 7:00 p.m. on Sunday, October 21, 2001, although truckers continued to handle the mail that had been in Brentwood and was being moved for processing to other facilities.

On Monday, October 22, 2001, Brentwood employee Joseph Curseen went to the hospital with flu-like symptoms. Mr. Curseen died that evening of inhalation anthrax. Two other Brentwood employees were hospitalized and nine became ill with anthrax-like symptoms. On that day, one of the mid-level managers allegedly told a supervisor that the mid-level managers had been instructed by senior management to lie to the floor supervisors and employees about Brentwood being contaminated with anthrax.

When the complaint was filed in October of 2003, Brentwood was still closed due to anthrax contamination. It has now reopened.

II. USPS POLICIES AND AGREEMENTS ON SAFETY AND HEALTH

Each of the plaintiffs except Mr. Alston is represented by a union that has negotiated a collective bargaining

agreement with USPS setting terms and conditions of employment. The then-effective agreements with APWU, NPMHU, and NALC contained provisions that stated, "It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force." In addition, each agreement contained a clause that stated:

> The Employer [USPS] and the Union insist on the observance of safe rules and safe procedures by employees and insist on correction of unsafe conditions. . . . The work place must be maintained in a safe and sanitary condition, including adequate occupational health and environmental conditions. If an employee believes he/she is being required to work under unsafe conditions, such employees may: (a) notify such employee's supervisor who will immediately investigate the condition and take corrective action if necessary; (b) notify such employee's steward, if available, who may discuss the alleged unsafe condition with such employee's supervisor; (c) file a grievance at Step 2 of the grievance procedure within fourteen (14) days of notifying such employee's supervisor if no corrective action is taken during the employee's tour; (d) and/or make a written report to the Union representative from the local Safety and Health Committee who may discuss the report with such employee's supervisor.

Id. PP 20, 23, 26. There was, and is, no collective bargaining agreement between USPS and NAPS, a union of supervisors.

USPS issued Management Instruction EL-860-1999-3 in October 1999. Titled, "Emergency Response to Mail Allegedly Containing Anthrax," the Instruction outlined the hazards of exposure to anthrax. It directed that "it is management's responsibility to minimize potential exposures through quick isolation and evacuation until emergency response and law enforcement can arrive and take control of the incident." *Id.* P 32. When anthrax exposure is suspected, USPS officials are directed by the Instruction to do the following:

> 1. Alert employees to stay in evacuation areas and not leave postal property so that they can receive necessary information and medical follow-up if appropriate.
>
> 2. Invoke the emergency action plan, including the following:
>
> > a. Effecting mechanical shutdowns (including air handling equipment), isolation and evacuation.
> >
> > b. Notifying the Inspection Service.
> >
> > c. Notify [sic] Postal Service Aviation Mail Security Office.
> >
> > d. Notify [sic] postal and local community emergency responders,

> which may include the health department, fire department, or local law enforcement.

Id. P 34. The complaint alleges that this Instruction was ignored.

At all relevant times, employees at Brentwood were entitled to the full protections and remedies of the federal Occupational Safety and Health Act of 1970, n7 *29 U.S.C. § 654, et seq.*, the right to decline to perform work for health and safety-related reasons, the right to request health and safety inspections, and the right to file complaints about unhealthy and unsafe work conditions. *Id.* P 29.

> n7 The Occupational Safety and Health Act is enforced by the Occupational Safety and Health Administration within the U.S. Department of Labor. To avoid confusion, the former is referred to as the OSH Act and the latter as OSHA.

III. LEGAL STANDARDS

For the court to grant a motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, it must "appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994)*. The primary issue in resolving a motion to dismiss is not whether

the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support his or her claims. *See Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1984), overruled on other grounds, Davis v. Scherer, 468 U.S. 183, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984).* At this early stage of the proceedings, the court must accept as true all of the plaintiff's well-pled factual allegations and draw all reasonable inferences in favor of the plaintiff. *See Alexis v. District of Columbia, 44 F. Supp.2d 331, 336-37 (D.D.C. 1999).* Although the court must construe the complaint in the light most favorable to the plaintiff, it "need not accept inferences drawn by the plaintiff if such inferences are not supported by the facts set out in the complaint." *Kowal, 16 F.3d at 1276.* In addition, the court does not need to accept the plaintiff's legal conclusions as true. *See Alexis, 44 F. Supp.2d at 337.*

IV. ANALYSIS

Plaintiffs contend that USPS officials suspected that Brentwood was contaminated with anthrax on Wednesday, October 17, 2001, and knew absolutely by Thursday or Friday, October 18 or 19, that those suspicions were accurate. Nonetheless, USPS officials are alleged to have consistently assured Brentwood employees that the facility was safe and encouraged them to continue processing the mail until just before noon on Sunday, October 21 -- and even then some postal workers remained in the plant until Sunday evening removing mail. Defendants are accused of violating Plaintiffs' *Fifth Amendment* rights to due process by providing false and/or misleading information and/or failing to provide accurate information about the safety of the facility. This misinformation allegedly deprived Plaintiffs of remedies allowed under their collective bargaining agreements.

deprived Plaintiffs of the protections and remedies of the OSH Act, and deprived Plaintiffs of the benefit of USPS emergency response procedures. Count V of the Complaint alleges that the misleading and/or false information also deprived Plaintiffs of their "substantive due process liberty interest in a safe work environment free from needless danger." Compl. P 127. Plaintiffs seek to take advantage of Supreme Court precedent that has recognized suits for money damages against individual federal officials for violations of citizen constitutional rights. *See Bivens v. Six Unknown FBI Narcotics Agents, 403 U.S. 388, 390, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)* (*Fourth Amendment* violation "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."). Defendants argue that *Bivens* does not apply to this situation and that Plaintiffs have failed to allege a cognizable substantive due-process violation. In the alternative, Defendants contend that each of them is protected by qualified immunity from Plaintiffs' procedural and substantive due-process claims.

A. Plaintiffs' Procedural Due Process Claims

Plaintiffs assert that Defendants knew or should have known that Brentwood was contaminated with anthrax "but knowingly provided them with false and/or misleading information about the safety of the facility and/or failed to provide them with accurate information about the contamination . . . [as a result of which] Plaintiffs suffered unnecessarily prolonged exposure to deadly anthrax spores." Pls.' Motion to Strike P 1; Compl. PP 43-44. Plaintiffs also allege that USPS officials "threatened, coerced and intimidated the Brentwood workers into not making inquiries about the Daschle letter, the safety of the facility, or their own

safety" in violation of their due-process rights. Pls.' Opp. to Defs.' Motion to Dismiss ("Pls.' Opp.") at 8; Compl. P 44.

A private damages remedy for constitutional violations by federal officials was first recognized in *Bivens*, a case in which the Supreme Court authorized money damages for the victim of an unreasonable search and seizure in violation of *Fourth Amendment* rights. *See 403 U.S. at 390*. The Court based its new remedy on the courts' inherent powers to remedy constitutional violations, at least in the absence of apparent alternative remedies and with "no special factors counseling hesitation in the absence of affirmative action by Congress." *Id. at 396*. Subsequent decisions in *Davis v. Passman, 442 U.S. 228, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979)*, and *Carlson v. Green, 446 U.S. 14, 64 L. Ed. 2d 15, 100 S. Ct. 1468 (1980)*, allowed *Bivens* actions because "the Court found that there were no special factors counseling hesitation in the absence of affirmative action by Congress,' no explicit statutory prohibition against the relief sought," and "no exclusive statutory alternative remedy." *Schweiker v. Chilicky, 487 U.S. 412, 421, 101 L. Ed. 2d 370, 108 S. Ct. 2460 (1988)*.

In the three decades since *Carlson*, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68, 151 L. Ed. 2d 456, 122 S. Ct. 515 (2001)*. The Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky, 487 U.S. at 422*. As the law has developed, the Court has relied on the two factors identified in *Bivens* to prevent its extension: the very existence of "apparent alternative remedies" is itself a "special factor [] counseling hesitation." *See id. at 423* ("When the

design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

Perhaps most notably, the courts have been hesitant to extend *Bivens* into the employer-employee relationship between the federal government and its employees. *See Bush v. Lucas, 462 U.S. 367, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983)*. *Bush* made this point emphatically. The Court concluded that the federal employment relationship is "governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," *id. at 368*, and therefore declined to recognize a cause of action against a supervisor who had disciplined an employee in violation of his *First Amendment* rights. *Id. at 390; see also Spagnola v. Mathis, 273 U.S. App. D.C. 247, 859 F.2d 223, 230 (D.C. Cir. 1988) (per curiam) (en banc)* (finding the Civil Service Reform Act to be a "special factor" precluding judicial creation of a *Bivens* remedy to challenge a federal personnel action). "Although the plaintiff [in *Bush*] had no opportunity to fully remedy the constitutional violation, [the Supreme Court] held that the administrative review mechanisms crafted by Congress provided meaningful redress and thereby foreclosed the need to fashion a new, judicially crafted cause of action." *Malesko, 534 U.S. at 68*. Thus, "so long as the plaintiff has an avenue for *some redress*, bedrock principles of separations of powers foreclose [] judicial imposition of a new substantive liability." *Id. at 69* (emphasis added).

There is no doubt that the plaintiffs in this matter have access to a full range of administrative and contractual fora to

remedy the harm that exposure to anthrax might have created. First, of course, is the Federal Employees Compensation Act ("FECA"), *5 U.S.C. § 8101 et seq.*, which is the federal sector version of workers' compensation. Like State workers' compensation programs, FECA provides the exclusive remedy for claims against the employer -- the United States -- for workplace injuries and illnesses. *See United States v. Lorenzetti, 467 U.S. 167, 169, 81 L. Ed. 2d 134, 104 S. Ct. 2284 (1984)* ("The United States' liability for work-related injuries under FECA is exclusive. . . ."); *Turner v. Tenn. Valley Auth., 859 F.2d 412, 413 (6th Cir. 1988)* (noting that the Supreme Court "has consistently held that FECA is the exclusive remedy employed by federal agencies and instrumentalities."); *DiPippa v. United States, 687 F.2d 14, 17 (3d Cir. 1982)* ("Where FECA applies, its remedy is exclusive and bars all other claims for compensation against the Government."). Indeed, FECA itself is explicit that it offers the exclusive remedy for work-related injuries in claims against the United States or its instrumentalities. *see 5 U.S.C. § 8116(c)* (FECA "is exclusive and instead of all other liability of the United States . . . to the employee . . . because of the injury . . . in a civil action. . . .").

Second, Plaintiffs had, in October 2001, and still do have, access to OSHA and its enforcement of workplace health and safety through inspections and citations for dangerous conditions. The OSH Act allows an inspector to close a facility if significant danger exists; orders and citations issued by OSHA are subject to challenge and litigation with full review in the courts of appeals and the Supreme Court as needed. *See 29 U.S.C. § 660.* Third, all but one of the named plaintiffs have rights under the various collective bargaining agreements to which the postal worker unions are signatory; every one of these contracts provides for grievances over

safety issues that can lead to independent and binding arbitration. *See Steelworkers v. American Mfg. Co., 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960); Steelworkers v. Warrior Gulf Navigation Co., 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960).* Because of these inter-related and complex schemes, most particularly FECA, Defendants seek dismissal, arguing that these alternative avenues counsel against recognizing a *Bivens* remedy here.

Plaintiffs contend that Defendants have missed the point entirely. They do not dispute the existence of FECA, OSHA, or their collective bargaining agreements' grievance/arbitration processes. Instead, they claim that "they are entitled to maintain a *Bivens* cause of action for money damages because Defendants wholly prevented them from pursuing the very remedies that do exist and that they were entitled to pursue." Pls. Surreply at 4 (citing *Grichenko v. United States Postal Service, 524 F. Supp. 672, 676-78 (E.D.N.Y. 1981), aff'd without opinion, 751 F.2d 368 (2d Cir. 1984)).* Plaintiffs argue that their procedural due-process claim is separate from any claim for substantive injury that they might file under FECA, the OSH Act, or the collective bargaining agreements. *Grichenko* appears to support this argument.

In *Grichenko*, a postal worker with an eye injury alleged that his supervisors "intentionally acted to deprive him of the opportunity to present a disability claim to the Department of Labor." *Id. at 677.* The District Court for the Eastern District of New York found deliberate failures on the part of Mr. Grichenko's supervisors to submit his FECA disability claim. Such failures created a *Bivens* remedy because Mr. Grichenko

was time-barred from obtaining FECA benefits and because FECA would not provide a "substitute remedy for the constitutional violation asserted here." *Id.* Finding that these facts "warrant[ed] the availability of a strong deterrent," the court denied a USPS motion to dismiss. *Id.* The Second Circuit affirmed without opinion. *See Grichenko v. USPS, 751 F.2d 368 (2d Cir. 1984); see also Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980)* (discharged federal employee might have procedural due process claim, despite administrative appeal procedures, "if, as he alleged, defendants blocked his resort to [appeal procedures] by failing to cooperate with his inquiries and by continuing their threat to lodge criminal charges. . . .").

Nonetheless, *Grichenko* is not the strong support Plaintiffs wish it were. The law has passed it by. After *Bishop* and *Grichenko*, the Supreme Court decided *Schweiker v. Chilicky, 487 U.S. 412, 101 L. Ed. 2d 370, 108 S. Ct. 2460 (1988)*, which significantly limits the availability of a *Bivens* suit when an alternative administrative process exists. *Chilicky* specifically held that the remedy available under the administrative scheme need not be as broad as a lawsuit under *Bivens* to bar the latter. *Id. at 423.* The D.C. Circuit applied *Chilicky* in *Spagnola v. Mathis, 273 U.S. App. D.C. 247, 859 F.2d 223 (D.C. Cir. 1988)* (*per curiam*) (*en banc*), emphasizing that "the *Chilicky* Court made clear that it is the comprehensiveness of the statutory scheme involved, not the adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *859 F.2d at 227.* Upon its re-consideration of the same issues, the Eighth Circuit abandoned its original analysis in *Bishop v. Tice* and adopted the reasoning of *Spagnola. See McIntosh v. Turner, 861 F.2d 524 (8th Cir. 1988)* (holding that there is no need for a *Bivens*

remedy in the area of federal employment covered by the Civil Service Reform Act).

Plaintiffs argue that the Eighth Circuit did not abandon the rule "that a *Bivens* cause of action may be brought if government officials prevent a plaintiff from availing himself of the remedies that do exist and which he is entitled to pursue." Pls.' Surreply at 2-3. While this argument may be literally correct, it fails to appreciate the applicability of the *Chilicky* analysis here.

The *Chilicky* plaintiffs sought damages because their Social Security disability benefits had been denied without giving them access to full administrative and judicial review, as required by the *Social Security Act*. *See Chilicky*, *487 U.S. at 417-20*. The plaintiffs here attempt to distinguish *Chilicky*, *McIntosh* and *Spagnola* because they "are not arguing that they are entitled to maintain a *Bivens* cause of action for money damages because the remedies they were entitled to pursue are inadequate (as in *McIntosh* and *Spagnola*) or are non-existent (as in *schweiker* [*v. Chilicky*])." Pls.' Surreply at 3. Instead, Plaintiffs contend that "Defendants wholly prevented them from pursuing the very remedies that do exist and that they were entitled to pursue. . . . Defendants prevented Plaintiffs from seeking or availing themselves of the remedies they were entitled to pursue in a timely manner." *Id.* at 4.

Despite Plaintiffs' attempt to distinguish *Chilicky*, *McIntosh*, and *Spagnola* from this case, Plaintiffs' allegations raise the same kind of claim in a different fact pattern. As the Supreme Court noted in *Chilicky*, Plaintiffs' claim is one for "consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right." *Chilicky*, *487 U.S. at 428*. Notably, the defendants in *Chilicky*

had affirmatively misled the plaintiff as to their handling of his FECA claim. *Id. at 418.* The instant claim is essentially the same: it seeks damages arising from USPS officials preventing Plaintiffs from timely filing grievances or calling OSHA to terminate their alleged exposure to anthrax. Like the Social Security claimants in *Chilicky*, Plaintiffs had a certain avenue to relief (whether a grievance through the congressionally-sanctioned bargaining process or OSHA), which Defendants allegedly blocked through affirmative misinformation. Just as in *Chilicky*, this Court cannot "separate the harm resulting from the alleged constitutional violation from the harm resulting from the denial of a statutory right." *Id. at 428.* n8

n8 It should be noted that even if this Court were to accept Plaintiffs' legal argument that a *Bivens* remedy is appropriate where "government officials prevent a plaintiff from availing himself of the remedies that do exist and which he is entitled to pursue," Pls.' Surreply at 2-3, the imposition of such a remedy would not be appropriate based on the facts that Plaintiffs have alleged. Unlike the plaintiffs in *Grichenko* and *Bishop*, Plaintiffs here have failed sufficiently to allege that their access to all of the remedies that they were entitled to pursue were blocked by Defendants. Nothing in the complaint suggests that Plaintiffs were precluded from filing a grievance under their collective bargaining agreements, or a charge with OSHA, or utilizing any other post-exposure remedies that were available to them. *See Stuto v. Fleishman, 164 F.3d 820, 826 (2d Cir. 1999)*(noting that "*Grichenko* involved conduct that *foreclosed* the administrative

> remedies of FECA, and therefore FECA's protections were unavailable")(emphasis added); *Richmond v. Potter, et al., 2004 U.S. Dist. LEXIS 25374, *45, No. 03 Civ. 018 (D.D.C. Sept. 30, 2004)* (distinguishing plaintiff postal worker's claims from the claims in *Grichenko* because "FECA is still very much available to Plaintiff as a remedy.")

Caution in extending *Bivens* remedies to the federal workforce is particularly necessary. The Supreme Court's admonition from *Bush v. Lucas* remains pertinent in this case:

> Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it may also inform itself through factfinding procedures such as hearings that are not available to the courts.

487 U.S. 412, 101 L. Ed. 2d at 389. "Special factors' preclude the creation of a *Bivens* remedy for civil service employees and applicants who advance constitutional challenges to federal personnel actions." *Spagnola, 859 F.2d at 230.* The Court does not condone the alleged campaign of misinformation from USPS to the postal employees at Brentwood, but finds that the existence of numerous avenues of relief for the underlying harm -- possible exposure to anthrax -- counsels against creating an individual *Bivens*

remedy from USPS managers. Plaintiffs' procedural due-process claim is barred by *Chilicky* and *Spagnola*. n9

n9 In the alternative, the Court finds that a *constitutional* right to be free from interference with procedural remedies, such as correct information to trigger a grievance filing or a call to OSHA, was not clearly established in the fall of 2001 so that the defendants would be entitled to qualified immunity were this cause of action to be recognized now. *See Butera v. District of Columbia, 344 U.S. App. D.C. 265, 235 F.3d 637, 652-54 (D.C. Cir. 2001).*

The complaint allegations based on denial of procedural due process will be dismissed. n10

n10 Whether plaintiffs can receive FECA benefits or contractual damages for the harms they allege in this lawsuit is unclear but not dispositive. "It is the comprehensiveness of the statutory scheme involved, not the adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Spagnola, 859 F.2d at 227.* The case law is split on the question of whether FECA provides coverage for injuries caused by mental or emotional distress. *See Gergick v. Austin, 764 F. Supp. 580 (W.D. Mo. 1991)* (emotional distress claim not covered by *FECA); Sullivan v. U.S., 428 F. Supp. 79 (D.C. Wis. 1977)* (same); *but see Bennett v. Barnett, 210 F.3d 272 (5th Cir. 2000), cert. denied, 531 U.S. 875, 148 L. Ed. 2d 125, 121 S. Ct. 181 (2000)* (postal employee's emotional distress claims against postal officials were

preempted by FECA; denial of claims by Secretary of Labor for lack of proof indicated that FECA coverage existed)

B. Plaintiffs' Substantive Due Process Claim

Plaintiffs also assert that Defendants violated their substantive rights to due process "arising under the Government/State Endangerment Theory of recovery." Pls.' Surreply at 5. Plaintiffs characterize this theory as one that makes a government official "liable for third-party injury where the government official affirmatively acts to create or enhance the danger that ultimately results in the individual's harm." *Id.*; *see Butera v. District of Columbia.*, *344 U.S. App. D.C. 265, 235 F.3d 637, 651 (D.C. Cir. 2001)*. In further explanation, Plaintiffs assert:

> once Defendants *affirmatively acted* to provide Plaintiffs with information regarding the safety of the Brentwood facility and whether the facility was contaminated with anthrax, they had a constitutional duty, under the well-established State/Government Endangerment Theory, not to enhance or make Plaintiffs more vulnerable to the danger of anthrax contamination (a) by lying to them and misleading them with information Defendants knew to be false, and (b) by preventing Plaintiffs from learning of their exposure to anthrax and preventing them from getting medical treatment.

Pls.' Surreply at 6-7. Defendants respond that Plaintiffs' argument must fail because a government employer's failure to warn employees about known risks of harm does not deprive such employees of liberty without due process of law. In the alternative, Defendants contend that all of the defendants have qualified immunity from this claim.

The Supreme Court has defined and interpreted substantive due process as the right of individuals to be protected from arbitrary government action. *See County of Sacramento v. Lewis, 523 U.S. 833, 845, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)*. However, "as a general matter, a State's failure to protect an individual from private violence, even in the face of a known danger, does not constitute a violation of the *Due Process Clause*.'" *Butera, 235 F.3d at 647* (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989)*). The Supreme Court has intimated and several lower courts have held that an exception to this general rule exists " where the state creates a dangerous situation or renders citizens more vulnerable to danger.'" *Id. at 649* (quoting *Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993)*; *see DeShaney, 489 U.S. at 201*. The D.C. Circuit adopted this theory of "State Endangerment" in *Butera* -- the decision upon which Plaintiffs premise their substantive due-process claim.

Butera involved the death of a citizen of the District of Columbia during an undercover drug "buy." Having advised the police that some murder suspects were selling drugs at a certain house, Mr. Butera approached the house from the backyard to buy drugs. He never made it into the house because he was accosted and stomped to death by three men in the backyard. According to the police plan, Mr. Butera was to have exited the front door of the house within fifteen

minutes. Although the police observing the front of the house were anxious when he failed to appear, no one searched the backyard. His body was discovered forty minutes later.

After reviewing these facts, the D.C. Circuit Court of Appeals concluded that "an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm." *Butera, 235 F.3d at 651.* n11 However, in adopting this new theory of government liability, the Court emphasized that the government conduct at issue must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* "This stringent requirement exists to differentiate substantive due process, which is intended only to protect against arbitrary government action, from local tort law." *Id.*

> n11 Because the theory of State Endangerment had not previously been recognized in this circuit, the court ultimately dismissed the complaint against the officers, who could not have known that their actions might make them liable for a violation of Mr. Butera's constitutional rights to substantive due process. *Butera, 235 F.3d at 654.*

Thus, in light of *Butera*, whether Defendants can be held liable under the theory of State Endangerment requires a two-part analysis, which raises the following questions: (1) has there been an affirmative act by Defendants to create or increase the danger that resulted in harm to Plaintiffs and, if so, (2) does that act shock the conscience? *See id.*; *Fraternal*

Order of Police/Dept. of Corr. Labor Comm., et al. v. Williams, et al., *263 F. Supp. 2d 45, 47 (D.D.C. 2003), aff'd 363 U.S. App. D.C. 1, 375 F.3d 1141 (D.C. Cir. 2004)*. Based on the allegations in Plaintiffs' complaint, the Court answers each of these questions in the affirmative. However, because Defendants contend that they are entitled to qualified immunity, the Court must also determine whether the contours of the specific constitutional violation that Plaintiffs allege were "clearly established" at the time of Defendants' conduct. Since this question must be answered in the negative, Plaintiffs' substantive due-process claim will be dismissed.

1. Plaintiffs Have Sufficiently Alleged That Defendants Affirmatively Acted to Increase the Danger of Plaintiffs' Exposure to Anthrax Contamination.

In *Butera*, the D.C. Circuit Court of Appeals emphasized that in order for the court to impose liability under the State Endangerment theory, there must have been *affirmative* conduct by the State to endanger the plaintiff:

> Regardless of the conduct at issue . . ., a key requirement for constitutional liability is affirmative conduct by the State to increase or create the danger that results in harm to the individual. No constitutional liability exists where the State actors "had no hand in creating a danger but [simply] stood by and did nothing when suspicious circumstances dictated a more active role for them."

Id. at 650 (citation omitted) (brackets in original); *see also DeShaney, 489 U.S. at 201* (refusing to impose constitutional liability where the State was aware of certain dangers but "played no part in their creation, nor did it do anything to render [the plaintiff] any more vulnerable to them."). Thus, in situations where State officials encounter a dangerous situation and simply fail to act, liability under the State Endangerment theory should be rejected. *See Butera, 235 F.3d at 650* ("Absent such affirmative conduct by the state . . . courts have rejected liability under a State endangerment concept."); *Reed, 986 F.2d at 1125 (7th Cir. 1993)* ("Inaction by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens from each other]."). Conversely, where state officials create a dangerous situation or render individuals more vulnerable to a dangerous situation, constitutional liability may be imposed. *See Butera, 235 F.3d at 649; Reed, 986 F.2d at 1125.*

Defendants argue that Plaintiffs have failed to allege that Defendants acted *affirmatively* to create or enhance a dangerous situation. They contend that Plaintiffs' substantive due-process claim is based on Defendants' *inaction*, and thus hinges solely on "whether the due process clause requires public employers to advise their employees about known risks in the workplace." Defs.' Reply at 5. Defendants rely on the Supreme Court's decision in *Collins v. City of Harker Heights, 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992)*, for the proposition that the failure of government employers to warn its employees about known dangers and to provide its employees with a safe working environment does not rise to the level of a constitutional violation. *See Collins, 503 U.S. at 126.*

Defendants are correct that in light of *Collins*, their mere failure to warn Plaintiffs about a danger of anthrax contamination does not expose them to constitutional liability. *See id.*; *see also Washington v. District of Columbia, 256 U.S. App. D.C. 84, 802 F.2d 1478, 1482 (D.C. Cir. 1986)* ("Whatever appellant's rights may be under state law, he has no constitutional right to a safe working environment."). However, Plaintiffs' allegations are not premised upon the notion that Defendants violated their substantive due-process rights solely by failing to warn them of a known risk or to provide them with a safe working environment. Instead, Plaintiffs allege that Defendants made affirmative misrepresentations about the safety of the facility. While it is clear that Plaintiffs do not allege that Defendants *created* the danger at Brentwood, Plaintiffs contend that by providing false safety briefings and representing to employees that there was no evidence of anthrax contamination at the facility (despite alleged actual knowledge to the contrary), Defendants increased the risk that Plaintiffs would be exposed to deadly anthrax spores and made Plaintiffs more vulnerable to such danger.

Butera does not support the imposition of constitutional liability under the State Endangerment theory where the defendants merely failed to take any action or "stood by and did nothing" in the face of a known danger. *See Butera, 235 F.3d at 650*. However, taking the allegations in Plaintiffs' complaint as true, Defendants did not simply "stand by and do nothing" once it became known that the Brentwood facility was contaminated with anthrax. Defendants are alleged to have engaged in a series of actions which intentionally misled Plaintiffs into believing the facility was safe and prevented them from acting to preserve their own safety. Giving

Plaintiffs the benefit of crediting the complaint allegations and all reasonable inferences therefrom, they have sufficiently alleged that Defendants took the requisite affirmative actions to trigger liability under the State Endangerment Theory to withstand dismissal on the pleadings.

2. Plaintiffs Have Sufficiently Alleged That Defendants' Conduct Shocks the Conscience.

To assert a substantive due-process violation under the State Endangerment theory, Plaintiffs must also demonstrate that Defendants' alleged conduct "was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Butera, 235 F.3d at 651* (quotations omitted). While it is generally intentional conduct that satisfies this stringent requirement, the Supreme Court has instructed that, in certain situations, "deliberate indifference can rise to a constitutionally shocking level." *County of Sacramento v. Lewis, 523 U.S. 833, 852, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)*. However, the D.C. Circuit has concluded that "the lower threshold for meeting the shock the conscience test by showing deliberate indifference as opposed to intentional conduct applies only in circumstances where the State has a heightened obligation toward the individual.'" *Fraternal Order of Police, 375 F.3d at 1146* (quoting *Butera, 235 F.3d at 651*).

Butera noted that the State has a "heightened obligation" toward an individual when it takes a person into its custody, thereby creating a situation that "'so restrains [an individual's] liberty that it renders him unable to care for himself.'" *Butera, 235 F.3d at 651* (quoting *Lewis, 523 U.S. at 851*). However, the court did not limit situations in which "deliberate indifference" can shock the conscience solely to the context of State custody. In holding that Butera could prove that the

defendant police officers' treatment of him in connection with an attempted undercover drug buy "shocked the conscience," the court noted:

> As in the context of State custody, the State *also* owes a duty of protection when its agents increase the danger to an individual. Like prison officials who are charged with overseeing an inmate's welfare, State officials who create or enhance danger to citizens may also be in a position where "actual deliberation is practical" (citations omitted). In the instant case, the officers had the opportunity to plan the undercover operation with care.

Butera, 235 F.3d at 652 (emphasis added); *but see Richmond v. Potter, et al., 2004 U.S. Dist. LEXIS 25374, *27, No. 03 Civ. 018 (D.D.C. Sept. 30, 2004)* (noting that courts have been "extremely hesitant" to expand the "special circumstances" in which a state official's deliberate indifference can shock the conscience "outside of the context of *actual custody*")(emphasis in original).

Similarly, in *Estate of Anthony Phillips v. District of Columbia, 257 F. Supp.2d 69 (D.D.C. 2003)*, this court applied the State Endangerment theory articulated in *Butera*, and ultimately held that the plaintiffs had sufficiently alleged that the defendants' conduct demonstrated "deliberate indifference" that rose to a "constitutionally shocking level." *Id. at 77*. The *Phillips* plaintiffs were injured firefighters and the estates of two deceased firefighters who alleged that the

District of Columbia and several fire department employees had violated their substantive due-process rights by failing to train, equip and staff the department appropriately and by failing to follow standard operating procedures. The court concluded that the allegations that the defendants were on notice about the serious consequences that could result from such failures painted a story that "shocks the conscience sufficiently to withstand the District's motion [to dismiss]." *Id. at 79.*

Plaintiffs allege here that Defendants acted with deliberate indifference because they knew that Brentwood was contaminated with anthrax, yet, to keep the employees working, they continued to make affirmative misrepresentations concerning the facility's safety. Plaintiffs also allege that by not providing them with accurate information concerning the safety of the Brentwood facility and by "threatening, intimidating, and/or coercing" them to continue working at the anthrax-contaminated facility, Defendants made Plaintiffs "more vulnerable to the danger of anthrax contamination." Pls.' Surreply at 6. In addition, Plaintiffs have alleged a series of events that they argue demonstrate that Defendants were put on notice "that anthrax spores sent through the mail could penetrate the sides of a sealed envelope during processing at the Brentwood facility and, thereby, cause serious injury and/or death to Plaintiffs. . . ." *Id.* at 39.

The Court has given considerable thought to Plaintiffs' arguments. If the facts are as alleged, the conduct of USPS managers would appear commendable for their dedication to getting the mail out but deplorable for not recognizing the potential human risk involved. Just as in *Butera* and *Phillips*, these alleged actions demonstrated a gross disregard for a

dangerous situation in which "actual deliberation [was] practical." *Butera, 235 F.3d at 652* (citation omitted). It is alleged that Defendants "had been put on notice of the serious consequences that could result" from Plaintiffs' exposure to anthrax yet, despite such knowledge, Defendants engaged in a campaign of misinformation designed to keep the employees at work. *Phillips, 257 F. Supp.2d at 79*. As noted by the Supreme Court in *Lewis*, " when opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking.'" *Id. at 77* (quoting *Lewis, 523 U.S. at 844*). The Court therefore finds that Plaintiffs have sufficiently alleged that Defendants' conduct amounted to deliberate indifference, which violated their substantive due-process rights under the State Endangerment theory.

Defendants' reliance on cases such as *Collins* and *Washington* to support their proposition that "the state endangerment' theory of *Butera* cannot be applied to the plaintiffs' allegations concerning a federal workplace," Defs.' Reply at 8, is misguided. In *Washington*, the D.C. Circuit Court of Appeals refused to impose constitutional liability where the plaintiff prison guard alleged that he was injured at work as a result of the failure of the District to remedy unsafe conditions at the prison. The court explained:

> Prison guards, unlike the prisoners in their charge, are not held in state custody. Their decision to work as guards is voluntary. If they deem the terms of their employment unsatisfactory, e.g., if salary, promotion prospects, or safety are inadequate, they may seek employment elsewhere. The state did not

> force [the plaintiff] to become a guard, and the state has no constitutional obligation to protect him from the hazards *inherent in that occupation*.

Id. at 1482 (emphasis added); *see also Fraternal Order of Police, 375 F.3d at 1146*. Unlike the plaintiffs in *Washington*, however, Plaintiffs here are not seeking constitutional redress based on Defendants' failure to protect them from a hazard that was "inherent" in their occupation. While it is true that Defendants did not force Plaintiffs to become postal workers, potential exposure to anthrax is not a danger that one would reasonably anticipate when accepting employment at a post office. *But see Richmond, 2004 U.S. Dist. LEXIS 25374 at *29, No. 03 Civ. 018* (keeping the Brentwood facility open did not constitute the deprivation of an actual constitutional right).

Although the *Washington* court severely limited the extent to which government employers can be held constitutionally liable for injuries sustained by their employees, the Supreme Court's subsequent decision in *Collins* flatly rejected the notion that a government employee can never assert a substantive due-process claim against the government. *See 503 U.S. at 120* (noting that the *Due Process Clause* "afford[s] protection to employees who serve the government as well as to those who are served by them, and 1983 provides a cause of action for all citizens injured by an abridgement of those protections."); *see also Phillips, 257 F. Supp.2d at 78*. Thus, the Court finds that the relevant case law does not preclude Plaintiffs' substantive due-process claims under the State-Endangerment theory.

3. Defendants Are Entitled To Qualified Immunity.

While Plaintiffs have sufficiently alleged that Defendants' conduct violated their substantive due-process rights, the inquiry into potential liability does not stop there. Defendants argue that they are shielded from liability because there was no "pre-existing law" making it apparent that their alleged conduct would violate the *Due Process Clause*. Defs.' Mot. at 22. Accordingly, Defendants contend that they are entitled to dismissal of Plaintiffs' claims under the doctrine of qualified immunity.

Qualified immunity shields State officials from constitutional liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)*. If a plaintiff sufficiently alleges that a State official's conduct violated a constitutional right, "the next . . . step is to ask whether the right was clearly established." *Saucier v. Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)*. "A constitutional right was clearly established' at the time of the events in question only if the contours of the right [were] sufficiently clear that a reasonable officer would understand that what he [was] doing violate[d] that right." *Butera, 235 F.3d at 646* (quoting *Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)*). Underlying the doctrine of qualified immunity is the principle of fair notice. *Moore v. Hartman, 363 U.S. App. D.C. 350, 388 F.3d 871, 2004 WL 2514383, at * 5 (D.C. Cir. 2004)*. "The unfairness of holding officials responsible on grounds they could not have anticipated trumps the individual's interest in vindicating transgressed rights." *Id.* (citations omitted). Thus, a case should be dismissed where a

State official was not on notice that his conduct was clearly unlawful. *See Saucier, 533 U.S. at 202.*

In this case, Plaintiffs allege that they have a constitutional right arising under the State Endangerment theory. As discussed earlier, in light of this circuit's decision in *Butera v. District of Columbia*, Plaintiffs have sufficiently alleged a deprivation of a constitutional right. However, the contours of the constitutional duty arising under the State Endangerment theory were not sufficiently clear at the time of Defendants' alleged conduct such that they would understand that what they were doing violated Plaintiffs' rights. *See Anderson, 483 U.S. at 640.*

In *Butera*, the Court of Appeals concluded, "Butera's constitutional right to protection by the District of Columbia from third party violence was not clearly established" at the time that the events occurred. *Butera, 235 F.3d at 652.* The Court noted that the State Endangerment theory was not previously recognized in this circuit and that the only Supreme Court authority to support the concept "consisted of the often-quoted dictum in *DeShaney.*" *Id.* Accordingly, the court determined that the defendant officers were entitled to qualified immunity. *Id. at 654.*

Although this circuit has now recognized the State Endangerment theory, there continues to be "little consistency in courts' explanations of the types of actions that would amount to constitutional liability" under this theory. *Id. at 653; see Richmond, 2004 U.S. Dist. LEXIS 25374 at *31, No. 03 Civ. 018* ("An analysis of our circuit's post-*Butera* cases shows that a broad reading of the State Endangerment concept is still far from clearly established.'"). Perhaps most importantly, the case law in this circuit is still unclear as to whether the State Endangerment theory can apply to an

individual who voluntarily participated in the activity that ultimately caused him harm. *See Butera, 235 F.3d at 654* (not deciding whether State liability "would necessarily be eliminated or mitigated" in situations where the victim's participation was "arguably voluntary"). Thus, in the context of government employment, decisions in this circuit have come to different conclusions concerning the extent to which government officials can be held constitutionally liable under the State Endangerment theory for injuries sustained by government employees. *Compare Fraternal Order of Police, 375 F.3d at 1146-47* (holding that "special circumstances" are necessary for a State official's conduct to rise to a constitutionally-shocking level in the employment context) *with Phillips, 257 F. Supp.2d at 78-79* (concluding that a government employer's "deliberate indifference" was sufficient to "shock the conscience"). n12

n12 In *Richmond v. Potter, et al.*, a recent decision of this court that arose out of the same set of facts as the instant case, Judge Colleen Kollar-Kotelly concluded that the plaintiff could not show that Defendants' conduct in keeping the Brentwood Facility open constituted the deprivation of an actual constitutional right. *See 2004 U.S. Dist. LEXIS 25374 at *30, No. 03 Civ. 018.* The court acknowledged, however, that the law in this area was unclear and that "*Butera* might be read in a more expansive manner," in which case the plaintiff may be able to allege that the defendants' conduct amounted to a constitutional violation. *Id.* However, the court ultimately determined that even if the plaintiff could sufficiently allege a substantive due-process violation, "Plaintiff still cannot

show that it was clearly established' that Defendants would have been aware that their conduct was unlawful." *2004 U.S. Dist. LEXIS 25374 at *32.*

Based on the lack of clarity surrounding the exact contours of the State Endangerment theory in this circuit, this Court cannot unequivocally say that "in the light of preexisting law[,] the unlawfulness [of Defendants' alleged conduct] [] [was] apparent." *Anderson, 483 U.S. at 640.* Because the law was insufficiently clear in October of 2001 to alert Defendants to possible constitutional liability for their conduct surrounding the alleged misinformation to Brentwood employees, Defendants are entitled to qualified immunity.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' claims will be dismissed and the Court will enter judgment in favor of Defendants. A separate Order accompanies this Memorandum Opinion.

Dated: November 19, 2004.

ROSEMARY M. COLLYER

United States District Judge

ORDER

For the reasons stated in the Memorandum Opinion separately and contemporaneously issued this 19th day of November, 2004, it is hereby

ORDERED that Defendants' motion to dismiss is **GRANTED;** and it is

FURTHER ORDERED that this case is DISMISSED from the docket of this Court.

SO ORDERED.

Dated: November 19, 2004.

ROSEMARY M. COLLYER

United States District Judge

(1)

Supreme Court, U.S.
FILED
APR 4 - 2006
OFFICE OF THE CLERK

Nos. 05-977 and 05-990

In the Supreme Court of the United States

DENA BRISCOE, ET AL., PETITIONERS

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

LEROY RICHMOND, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the comprehensive statutory scheme governing Postal Service employment, which includes remedies under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, and Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, precludes courts from creating a remedy for alleged constitutional violations under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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In the Supreme Court of the United States

No. 05-977

DENA BRISCOE, ET AL., PETITIONERS

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

No. 05-990

LEROY RICHMOND, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (05-977 Pet. App. 1a-4a; 05-990 Pet. App. 1a-3a) are unreported. The opinion of the district court in No. 05-977 (Pet. App. 5a-45a) is reported at 355 F. Supp. 2d 30. The memorandum opinion of the district court in No. 05-990 (Pet. App. 4a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals in each of the cases was entered on November 7, 2005. The petition for a writ of certiorari in No. 05-977 was filed on February 3, 2006. The petition in No. 05-990 was filed on February 6, 2006 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 12541.

STATEMENT

Petitioners are employees of the United States Postal Service who worked at the Brentwood Postal Facility in October 2001 when the facility was contaminated with anthrax as the result of a terrorist attack. They filed suits against Postmaster General Potter and other Postal Service officials in their individual capacities, alleging that the government officials violated petitioners' constitutional rights by knowingly misrepresenting hazards at the facility. Petitioners sought money damages for the alleged violations. The district court dismissed the suits. The court of appeals affirmed the dismissals, in unpublished per curiam opinions, concluding that the comprehensive statutory scheme governing Postal Service employment precludes the courts from creating additional remedies under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

A. The Statutory Remedial Scheme

The Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719, establishes a comprehensive scheme governing employment relations within the Postal Service. "The PRA operates largely by incorporating other statutes, including the [Federal Employees Compensation Act], *see* 39 U.S.C. § 1005(c), and parts of

the Civil Service Reform Act [of 1978]." *American Postal Workers Union* v. *United States Postal Serv.*, 940 F.2d 704, 708 (D.C. Cir. 1991).

The Federal Employees Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, provides that "[t]he United States shall pay compensation * * * for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. 8102(a). Determinations regarding FECA coverage are made by the Department of Labor and are not subject to judicial review. See 5 U.S.C. 8124(a), 8128(b), 8145. Where the FECA is applicable, other remedies are expressly foreclosed: "The liability of the United States or an instrumentality thereof * * * with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality." 5 U.S.C. 8116(c).

In addition to the FECA remedy, the PRA affords collective bargaining rights to postal workers not covered by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.* See *Bennett* v. *Barnett*, 210 F.3d 272, 274-275 (5th Cir.), cert. denied, 531 U.S. 875 (2000). Postal Service employees are also protected by Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which provides the exclusive remedial scheme for discrimination in federal employment on the basis of race, color, religion, sex, or national origin. See *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976).

B. Petitioners' Allegations

Because petitioners' suits were dismissed on the pleadings, this Court must assume the truth of the alle-

gations in their complaints. Those allegations are summarized below.[1]

On Thursday, October 11, 2001, a letter addressed to United States Senator Tom Daschle arrived in a mail bag at Brentwood. The mail bag was opened and its contents were separated into the Delivery Bar Code Sorter (DBCS) #17. The letter was delivered to the Hart Senate Office Building on Friday, October 12, and was opened in the Senator's office on Monday, October 15. The envelope held a white powder that contained anthrax spores. See 05-977 Pet. App. 8a-9a.

On Tuesday, October 16, all Senate employees were tested for anthrax exposure and given antibiotics as a countermeasure. On Wednesday, October 17, the United States House of Representatives was shut down after several staff members tested positive for exposure to anthrax. Anthrax spores were found in a mail room in the Dirksen Senate Office Building, through which the letter to Senator Daschle had passed before being sent on to the Hart Senate Office Building. On Thursday, October 18, all buildings on Capitol Hill were closed and quarantined. See 05-977 Pet. App. 10a-11a.

The Postal Service sought guidance from the Centers for Disease Control (CDC) and the District of Columbia (D.C.) Department of Health. On Thursday, October 18,

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[1] Two publications from the General Accounting Office (GAO) discuss the events of October 2001 and the larger context in which they occurred. See GAO, *Report No. 04-239, U.S. Postal Service, Better Guidance Is Needed to Ensure an Appropriate Response to Anthrax Contamination* (Sept. 2004) <http://www.gao.gov/new.items/d04239.pdf>; GAO, *Report No. 04-205T, Testimony Before the Committee on Government Reform of the House of Representatives, U.S. Postal Service, Clear Communication with Employees Needed before Reopening the Brentwood Facility* (Oct. 23, 2003) <http://www.gao.gov/new.items/d04205T.pdf>.

a hazardous materials response team from Fairfax County conducted testing at Brentwood. On the same day, a private contractor conducted more extensive environmental testing. See 05-977 Pet. App. 12a-13a.

On Friday, October 19, Postal Service officials asked the D.C. Department of Health to place all Brentwood employees on antibiotics for exposure to anthrax. See *ibid.* The same day, Postal Service employee Leroy Richmond, petitioner in No. 05-990, was admitted to the hospital and was examined for inhalation anthrax. On Sunday, October 21, after it was confirmed that Mr. Richmond had contracted inhalation anthrax, the CDC concluded that the Brentwood facility should be closed, and the Postal Service shut down the facility. Mr. Richmond survived, but two other Brentwood employees died of inhalation anthrax. See 05-977 Pet. App. 14a-15a.[2]

Petitioners allege that Postal Service officials knew or should have known by Wednesday, October 17, or earlier, that the anthrax spores contained in the Daschle letter had created a dangerous health risk, but the Postal Service did not close the Brentwood facility until Sunday, October 21. See 05-977 C.A. App. 24-25; 05-990 Pet. App. 48a. Petitioners also allege that Postal Service officials withheld information from employees and provided them with false or misleading information. For example, the *Briscoe* petitioners allege that, on Friday,

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[2] The *Briscoe* petitioners do not claim to have tested positive for anthrax. They allege that they experienced and continue to experience "anthrax-like symptoms, in addition to substantial emotional distress, pain, suffering, and anxiety." 05-977 C.A. App. 40; see *id.* at 41. "05-977 C.A. App." refers to the joint appendix filed in the court of appeals in Appeal No. 04-5447. "05-990 C.A. App." refers to the appendix filed in the court of appeals in Appeal No. 04-5403.

October 19, a distribution manager told petitioner Alston that DBCS #17 was contaminated with anthrax spores, but a manager later told employees that the machine was not contaminated. See 05-977 C.A. App. 33-34. The *Briscoe* petitioners also allege that, on Saturday, October 20, Postal Service officials told employees that a Postal Service worker had been admitted to the hospital the previous day "and was being examined for potential inhalation anthrax" but falsely stated that his infection with anthrax had not been confirmed. See *id.* at 36.

Counts I, II, and III of the *Briscoe* complaint allege violations of the procedural due process component of the Fifth Amendment. Petitioners allege that they were deprived of the remedies under their collective bargaining agreements, the protections of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, and the benefit of the Postal Service's emergency response procedures because of respondents' alleged misrepresentations. See 05-977 C.A. App. 41-43. Count IV of the complaint alleges a violation of the Fifth Amendment's substantive due process component. *Id.* at 43-44. Petitioners allege that they were deprived of their "substantive due process liberty interest in a safe work environment free from needless danger." *Id.* at 44.

Count I of the First Amended Complaint in *Richmond* alleges a violation of substantive due process based on respondents' alleged false representations about the dangers at the Brentwood facility. See 05-990 C.A. App. 46-47. Count II alleges an equal protection violation based on the contention that workers at the Brentwood facility were treated differently than congressional workers because of the different racial compositions of the two work forces. See *id.* at 47-48.

C. Proceedings Below

Respondents filed motions to dismiss in both cases, and the district court in each case granted the motion. Both courts concluded that the comprehensive statutory scheme governing Postal Service employment, which includes remedies under the FECA, precludes the courts from creating an additional *Bivens* remedy for the alleged constitutional violations. 05-977 Pet. App. 21a–31a; 05-990 Pet. App. 13a, 32a-41a. The district court in *Richmond* also observed that, even if the FECA does not cover petitioner Richmond's claim of racial discrimination, he has recourse to Title VII, which provides the exclusive remedy for racial discrimination in federal employment. *Id.* at 41a n.9.

Both courts also held that dismissal of the due process claims is required in any event because petitioners failed to allege a violation of a clearly established right and respondents are therefore entitled to qualified immunity. 05-977 Pet. App. 30a n.9, 31a-45a; 05-990 Pet. App. 15a-27a. The district court in *Richmond* further concluded that the equal protection claim must be dismissed because petitioner did not allege that respondents played any role in or had any control over Congress's decision about how to treat its employees. *Id.* at 27a-31a.

The court of appeals affirmed the district court's judgments in two unpublished, per curiam opinions. 05-977 Pet. App. 1a-4a; 05-990 Pet. App. 1a-3a. In each opinion, the court of appeals concluded that the *Bivens* "claims are precluded by an 'elaborate, comprehensive scheme' that Congress has provided to govern employees' injuries in federal workplaces." 05-977 Pet. App. 3a (quoting *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983)); 05-990

Pet. App. 2a (same). With respect to petitioner Richmond, the court of appeals also noted that "to the extent FECA does not cover Richmond's racial discrimination claim, Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of racial discrimination in federal employment." *Id.* at 3a (citing *Brown*, 425 U.S. at 835).

ARGUMENT

The unpublished, per curiam decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners in both actions contend that review is necessary to clarify the application of principles set out in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). Petitioners in *Briscoe* urge that review is required to address the application of those principles to their claims of procedural due process violations. 05-977 Pet. 20-22. Petitioner in *Richmond* asserts that review is necessary to determine the application of the principles to his substantive due process and equal protection claims. 05-990 Pet. 11-15.[3] The principles established by this Court in its *Bivens* cases are well-settled, and the court of appeals correctly applied those principles to the facts here.

a. This Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky*, 487 U.S. at 421. Indeed, in the past 25

[3] Petitioner Richmond also contends (05-990 Pet. i) that this Court should grant review to decide whether respondents are entitled to qualified immunity. That question is not properly before this Court because it was not addressed by the court of appeals. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

years, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001). And, in cases like *Bush* and *Chilicky*, the Court has made clear that a *Bivens* remedy should not be created when Congress has enacted a "comprehensive statutory scheme[]" that provides some remedies. *Chilicky*, 487 U.S. at 428; see *Bush*, 462 U.S. at 368.

In *Bush*, the Court held that the "comprehensive procedural and substantive provisions" of the CSRA precluded a First Amendment *Bivens* claim by a plaintiff who asserted that he had been fired for criticizing his employing agency. 462 U.S. at 368. In reaching that holding, the Court expressly assumed that the civil service remedies were not as effective as a *Bivens* suit and would not fully compensate the employee for the alleged First Amendment violation. *Id.* at 372. But the Court concluded that the fact that "existing remedies do not provide complete relief" does not justify augmenting a carefully-crafted and "elaborate remedial scheme" by creating a "new judicial remedy" for constitutional violations. *Id.* at 388. The Court underscored "Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a 'special factor counseling hesitation in the creation of a new remedy,'" noting that "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees.'" *Malesko*, 534 U.S. at 68 (quoting *Bush*, 462 U.S. at 380, 389).

In *Chilicky*, the Court refused to imply a *Bivens* remedy for alleged procedural due process violations by Social Security officials because Congress had not included a money damages remedy in the "elaborate re-

medial scheme" created by the Social Security Act. 487 U.S. at 414. Once again, the Court explicitly noted that the statutory remedies did not provide complete relief. *Id.* at 425. The Court observed that the Social Security review scheme would provide the plaintiff with, at most, retroactive disability benefits and offered no possibility of additional redress for the harms caused by the alleged due process violations. *Id.* at 424-425. But the Court explained that, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," it is inappropriate for a court to afford "additional *Bivens* remedies." *Id.* at 423.

Together, *Bush* and *Chilicky* firmly settled the principle that, when a statutory scheme provides a plaintiff with an "avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69 (citing *Chilicky*, 487 U.S. at 425-427).

b. Applying that principle, the court of appeals correctly held that the statutory remedies available to Postal Service employees, including those provided by the FECA and Title VII, preclude implication of an extra-statutory *Bivens* remedy here.

Under the FECA, employees are "guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation." *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983). An express condition of that comprehensive coverage is that liability under the FECA "with respect to the injury or death of an employee is exclusive and instead of all other liability." 5 U.S.C. 8116(c). Courts would disrupt the careful balance struck by Congress if they supplemented

the FECA remedial scheme with a judicially created money damages remedy. Congress has expressly addressed the question of monetary compensation for workplace injuries and has determined to foreclose litigation remedies in favor of guaranteed and "immediate, fixed benefits, regardless of fault." *Lockheed*, 460 U.S. at 194. Recognizing a *Bivens* remedy would re-open a door deliberately closed by Congress as a critical premise for creating a broad and comprehensive scheme to remedy workplace injuries.

Moreover, Postal Service employees have other statutory remedies besides the FECA that also make it inappropriate for courts to create a *Bivens* remedy. As described above, the PRA affords collective bargaining rights to postal workers not covered by the CSRA. See p. 3, *supra*. Employees thus have the right to file grievances over workplace safety and to have the grievances resolved through independent arbitration. See 05-977 C.A. App. 15-17; *Bennett* v. *Barnett*, 210 F.3d 272, 274-275 (5th Cir.), cert. denied, 531 U.S. 875 (2000). Several courts of appeals have held that the grievance procedures authorized by the PRA preempt *Bivens* claims.[4]

Congress has also addressed workplace safety through the OSH Act. The OSH Act is enforced by the Department of Labor, which has authority to issue citations, see 29 U.S.C. 658, and to seek injunctive relief, see 29 U.S.C. 662. Citations issued by the Department are

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[4] See *Bennett*, 210 F.3d at 275; *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272, 275-276 (10th Cir. 1991); *McCollum* v. *Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), cert. denied, 479 U.S. 1034, (1987); *Pereira* v. *United States Postal Serv.*, 964 F.2d 873, 875-876 (9th Cir. 1992); *Harding* v. *United States Postal Serv.*, 802 F.2d 766, 767-768 (4th Cir. 1986).

subject to review in the courts of appeals. See 29 U.S.C. 660; see generally *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3 (1985).

Finally, to the extent employees have claims about discrimination in the workplace, Postal Service workers, like other federal employees, are protected by Section 717 of Title VII, 42 U.S.C. 2000e-16. As this Court has held, Congress intended Title VII to provide the exclusive mechanism for federal employees to seek redress for claims of racial discrimination. *Brown*, 425 U.S. at 835.

2. The *Briscoe* petitioners urge this Court to augment the elaborate remedial scheme crafted by Congress with a *Bivens* remedy because, according to petitioners, respondents interfered with petitioners' use of the statutory remedies. See 05-977 Pet. 20-22. Petitioners cannot, however, meaningfully distinguish their situation from *Chilicky*, which also involved allegations that government officials violated the Constitution by preventing the plaintiffs from obtaining statutory benefits. The plaintiffs in *Chilicky* alleged that the officials deprived them of due process by deliberately undermining the procedures used to determine their eligibility for disability benefits; for example, by intentionally disregarding favorable evidence and by purposefully selecting biased physicians. 487 U.S. at 420 n.2. This Court nonetheless refused to create a *Bivens* remedy for what the Court described as "consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right." *Id.* at 428.[5]

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[5] Moreover, petitioners' situation does not actually present the question whether a *Bivens* remedy would be available if government officials had prevented all meaningful access to statutory remedies. As the district court found, petitioners "failed sufficiently to allege that their

The *Briscoe* petitioners also assert that other federal courts have recognized a *Bivens* remedy where plaintiffs have alleged that defendants unconstitutionally interfered with their access to statutory remedies. 05-977 Pet. 23-26. But petitioners rely principally on cases that pre-date the Court's decision in *Chilicky* and therefore have no continuing vitality after that decision. For example, petitioners cite *Bishop* v. *Tice*, 622 F.2d 349 (8th Cir. 1980), which was decided several years before both *Bush* and *Chilicky*. Moreover, the analysis in *Bishop* is inconsistent with the Eighth Circuit's later opinion in *McIntosh* v. *Turner*, 861 F.2d 524 (1988), which adheres to the principle set out in *Bush* and *Chilicky*. Petitioners also invoke *Grichenko* v. *United States Postal Serv.*, 524 F. Supp. 672 (E.D.N.Y. 1981), aff'd, 751 F.2d 368 (2d Cir. 1984) (Table), which likewise pre-dates *Chilicky*. Moreover, a conflict with a district court opinion is not a basis for this Court to grant a writ of certiorari. See Robert L. Stern et al., *Supreme Court Practice* 178 (7th ed. 1993).[6]

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access to all of the remedies that they were entitled to [was] blocked by [respondents]. Nothing in the complaint suggests that [petitioners] were precluded from filing a grievance under their collective bargaining agreement, or a charge with OSHA, or utilizing any other post-exposure remedies that were available to them." 05-977 Pet. App. 28a n.8. Indeed, even now, petitioners do not contend that they were precluded from seeking compensation under the FECA.

[6] For that reason, petitioners are not assisted by *Rauccio* v. *Frank*, 750 F. Supp. 566 (D. Conn. 1990), which, although it was decided after *Chilicky*, failed to follow this Court's guidance. Moreover, as explained in note 5, *supra*, petitioners here, unlike the plaintiffs in *Rauccio*, have not adequately alleged facts that, if true, would demonstrate that respondents "have rendered effectively unavailable any procedural safeguard established by Congress." 750 F. Supp. at 571.

3. Petitioner Richmond argues that this Court has not considered whether a comprehensive statutory scheme bars creation of a *Bivens* remedy for egregious misconduct of the kind alleged here. 05-990 Pet. 12, 14-15. The decisions in which the Court has declined to imply a *Bivens* remedy, however, have all assumed that the plaintiff stated a claim of the deprivation of a clearly established constitutional right. See, *e.g.*, *Bush*, 462 U.S. at 372; *Chilicky*, 487 U.S. at 428. The Court has never suggested that it would be possible or appropriate to establish a hierarchy of constitutional rights in applying the *Chilicky* analysis. In any event, there is no reason to conclude that the constitutional violations alleged here are more worthy of a damages remedy via *Bivens* than the serious violations alleged in *Bush* and *Chilicky*.

Petitioner Richmond tacitly admits that he could seek relief for his injuries under the FECA but argues that the statutory remedy is inadequate because it is paid by the government and will not deter misconduct by federal officials. 05-990 Pet. 16-18. That argument proves too much, however, because it applies to any instance in which a statutory scheme does not include a damages remedy against individual employees. In both *Bush* and *Chilicky*, for example, the monetary relief provided by the statutory remedies was paid by the United States rather than the individual government officials. See *Bush*, 462 U.S. at 372 & n.8; *Chilicky*, 487 U.S. at 424. Petitioner's argument is premised on the misconception that he is entitled to relief because the remedies provided by Congress do not provide for the same recovery that he might obtain in a *Bivens* action. As this Court stressed in *Malesko*, "[i]t is irrelevant to a special factors analysis whether the laws currently on the books afford [the plaintiff] an adequate federal rem-

edy for his injuries." 534 U.S. at 69 (quoting *United States* v. *Stanley*, 483 U.S. 669, 683 (1987)).

For similar reasons, petitioner errs in contending that Title VII does not preclude a *Bivens* action for his equal protection claim because he cannot state a claim under the statute. 05-990 Pet. 19-20. A *Bivens* remedy is not available simply because the statutory scheme does not provide complete or even adequate relief. See *Chilicky*, 487 U.S. at 425 (observing that "[t]he creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed"); *Bush*, 462 U.S. at 373 (assuming that "Congress has provided a less than complete remedy for the wrong"). To the contrary, a court has no basis to create a damages remedy against a federal official for conduct that Congress chose not to make actionable. See *Chilicky*, 487 U.S. at 429; see also *Bush*, 462 U.S. at 385 n.28 (refusing to create a *Bivens* action even though the statutory scheme provided no remedy for short suspensions or adverse personnel actions against probationary employees).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-977

In The
Supreme Court of the United States
October 2005 Term

DENA BRISCOE, *et al.*,

Petitioners,

v.

JOHN E. POTTER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In their Petition for Writ of Certiorari, Petitioners raised an important question of federal law, namely, whether a *Bivens*-type action is maintainable where a plaintiff alleges that a defendant violated his procedural due process rights by interfering with or rendering unavailable contractual or statutory remedies that the plaintiff otherwise had the right to pursue. In this case, it was especially important that Petitioners be able to invoke the remedies at issue in a timely manner to protect themselves from imminent danger: continued exposure to a highly potent, "weaponized" form of anthrax that had contaminated their workplace in October 2001.

Respondents argue in their Brief For the Respondents In Opposition ("Resp'ts' Br.") that the Court answered this question in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). *See* Resp'ts' Br. at 12. Respondents' argument misses the mark, however, because it misconstrues the question presented in *Schweiker*.

In *Schweiker*, the plaintiffs' social security disability benefits were terminated improperly. Although the plaintiffs' benefits were subsequently restored, the plaintiffs brought a *Bivens*-type action seeking consequential damages for the economic and emotional hardships they suffered as a result of the termination. *Schweiker*, 487 U.S. at 428. The question in *Schweiker* was whether the plaintiffs could recover money damages above and beyond the restoration and retroactive payment of benefits they had achieved by invoking preexisting statutory remedies. The question was not whether

the plaintiffs were unconstitutionally deprived of a statutorily created remedial scheme or any portion thereof.

The case at bar presents a very different question. Petitioners alleged that Respondents prevented them from invoking remedies otherwise available under their collective bargaining agreements, the Occupational Safety and Health Act, and other provisions by lying to them about anthrax contamination at the Brentwood facility. Moreover, time was of the essence. The imminent danger posed by exposure to weaponized anthrax spores made it all the more necessary for Petitioners to be able to invoke these remedies as quickly as possible in order to protect themselves and their co-workers from continued exposure. Under such circumstances, wherein Petitioners were prevented from invoking remedies that would have protected them from continued exposure to anthrax, it is not enough for Respondents to point to the Federal Employees Compensation Act ("FECA") and assert that workers who became ill or died as a result of exposure to anthrax could later seek compensation under FECA. Our constitution requires these workers to have been treated better.

The "special factor" militating against the creation of a *Bivens* remedy that the Court found to exist in *Schweiker* does not exist in a case such as this because it makes no difference whether a comprehensive statutory or contractual scheme exists if the plaintiffs are prevented from availing themselves of the remedies contained therein. The court in *Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990), a case decided *after* this Court's decision in *Schweiker*, correctly recognized this critical distinction:

> However, as plaintiff points out, *Bush v. Lucas* and its progeny are premised on the existence and availability of an adequate system of procedural safeguards through which a plaintiff may seek relief. In the instant case, the plaintiff's due process claim is premised on the defendants' interference with the procedural mechanism which Congress has created for the protection of employees. It is in this critical respect that *Bush v. Lucas* and the related cases cited by defendants are distinguishable. In each, the availability of an adequate procedural remedy was fatal to plaintiff's *Bivens* claims. In this case, assuming plaintiff's factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress. Thus, *Bush* and its progeny are inapplicable to the facts of this case.

The Court should, thus, take this opportunity to address the novel question of law presented in this case and declare that a procedural due process, *Bivens*-type remedy is maintainable if it is alleged that the defendant interfered with or otherwise rendered unavailable the substantive statutory or contractual remedies that the plaintiff had a right to pursue.[1]

---

[1] Respondents argue in a footnote that "petitioners' situation does not actually present the question whether a *Bivens* remedy would be available if government officials had prevented all meaningful access to statutory remedies" because petitioners "failed sufficiently to allege that their access to all of the remedies that they were entitled to [was] blocked by [respondents]." Resp'ts' Br. at 12 n.5. Respondents are clearly wrong, as Petitioners alleged in their Complaint that Respondents interfered with and prevented Petitioners from pursuing their statutory and contractual administrative remedies during the critical four days that Respondents

Respondents also misconstrue the holding in *McIntosh v. Turner*, 861 F.2d 524 (8th Cir. 1988), as inconsistent with *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980). *See* Resp'ts' Br. at 13. In *McIntosh*, the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") was called upon to decide whether a federal employee could bring a *Bivens* cause of action for money damages for the denial of the right to be considered for a promotion on a fair and unbiased basis. The Eighth Circuit concluded that the plaintiffs' cause of action was maintainable because the available civil service statutory remedies were inadequate in that they did not provide for money damages for a violation of a constitutional right when federal employees are denied promotions on an unfair and biased basis. *McIntosh v. Weinberger*, 810 F.2d 1411, 1435-36 (8th Cir. 1987).

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knew the Brentwood facility was contaminated with anthrax but still kept the facility open. *See Complaint* at ¶¶ 19, 20, 22, 23, 25, 26, 29, 30-34, 43-47, 49-76, 78-84, 86, 87, 89, 92-97, 100, 101, 103, 105, 107, 111, and 112. Respondents prevented Petitioners from pursuing their administrative remedies during these four days by coercing, intimidating, and threatening Petitioners not to make inquiries about the Daschle letter, the safety of the facility, or their own safety, and making false and/or misleading statements to Petitioners that the Brentwood facility was safe and that there was no evidence of anthrax contamination at the facility, among other false and/or misleading statements. *Id.* But for Respondents' illegal conduct, Petitioners would have timely invoked the remedies available to them under their collective bargaining agreements and the OSHA, as well as USPS emergency response procedures to have the facility shut down. *Id.* When the facility eventually was shut down after the four days in which Petitioners were needlessly exposed to anthrax contamination, Petitioners lost forever their right to pursue their remedies to have the facility closed.

This Court, however, vacated and remanded the case in light of its decision in *Schweiker*. *See Turner v. McIntosh*, 487 U.S. 1212 (1988). Upon remand, the Eighth Circuit abandoned its reasoning in light of *Schweiker* that a *Bivens'* type remedy is available if Congress fails to provide an adequate remedy for federal civil service employees who bring constitutional challenges to personnel actions. Contrary to Respondents' contention in the case at bar, however, the Court did not abandon the rule established in *Bishop*, namely, that a *Bivens*-type remedy is available if government officials prevent a plaintiff from availing himself of pre-existing remedies he is entitled to pursue. Ultimately, the Eighth Circuit found in *McIntosh* that Congress had provided remedies to the plaintiffs, even though those remedies might not be adequate. *McIntosh*, 861 F.2d 526. As a result, the plaintiffs could not maintain their *Bivens* claim. *Id.*

Lastly, despite the fact that Respondents admit Petitioners' allegations must be taken as true for purposes of review, Respondents nonetheless improperly attempt to influence this Court's deliberations, as they did in the district and appellate courts, by citing extraneous materials not mentioned in or attached to Petitioners' Complaint and not subject to judicial notice. *See* Resp'ts' Br. at 4 n.1. This Court must reject Respondents' improper litigation tactic as, in evaluating a Federal Rule of Civil Procedure 12(b)(6) motion, a court may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2nd Cir. 1991) (On motion to dismiss, court must limit itself to facts stated in complaint or in documents attached to complaint as exhibits or incorporated

in complaint by reference.); *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3rd Cir. 1994) (On motion to dismiss, court must consider only those facts alleged in complaint.); *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984) (Consideration of matters beyond complaint is improper in context of motion to dismiss); and *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624-25 and n.3 (D.C. Cir. 1997) (On motion to dismiss, court may consider only facts alleged in complaint, any documents either attached to or incorporated into complaint, and matters of which court can take judicial notice.).

Federal Rule of Evidence 201(b) states that a court may only take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This Court has recognized that "[j]udicial notice cannot be used to shortcut the evidentiary hearing process," so a court must not take judicial notice of facts contained in government reports if the facts are disputed and/or the facts go to the ultimate issue in the case, as do the facts in the government report that the Respondents improperly cite in the instant case. *Korematsu v. United States*, 584 F. Supp. 1406, 1415 (N.D. Cal. 1984). As a result, the Court should reject Respondents' improper references to extraneous matters outside the pleadings.

CONCLUSION

Petitioners respectfully request that a writ of certiorari be issued to resolve this important question of federal law that has not been, but should be, settled by this Court.

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